THE HAWAII RULES OF EVIDENCE

Addison M. Bowman*

On January 1, 1981, the new Hawaii Rules of Evidence[1] took effect "in the courts of the State of Hawaii."[2] Applicable generally in civil and criminal cases, the rules are a comprehensive codification of principles of evidence law resulting from a joint endeavor of the Judiciary of Hawaii and the Hawaii Legislature.[3] The intent of the rules is "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[4] Another goal is to achieve uniformity in the treatment of evidence among the courts of the State.[5] The purpose of this article is to describe the

---

* Professor of Law, University of Hawaii School of Law. A.B., Dartmouth College, 1957; LL.B., Dickinson School of Law, 1963; LL.M., Georgetown University Law Center, 1964. See note 3 *infra* for details of the author's work on Hawaii's evidence law.

[1] HAWAII REV. STAT. ch. 626 (Supp. 1980). All the rules are collected in *id.* § 626-1 and are cited throughout this article as HAWAII R. EVID.

[2] HAWAII R. EVID. 101. The rules apply to all courts in all proceedings except as provided in *id.* 1101. See Part IX *infra*.

[3] The cooperative approach was designed in part to avoid a separation of powers struggle between the legislative and judicial branches of government. S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 1-3 (1980); Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. HAWAII L. REV. 1, 36-38 (1979) [hereinafter cited as Richardson]. Initial impetus for evidence rules came from former State Representative Katsuya Yamada, who sponsored a bill in 1977, H.B. 22, 9th Hawaii Leg., 1st Sess. (1977). Legislative action was deferred pending study by a special Hawaii Judicial Council committee chaired by Honorable Masato Doi. Committee membership included Walter G. Chuck, David J. Dezzani, Marie N. Milks, Hideki Nakamura, Raymond J. Tam, and Stephen D. Tom. The author served as reporter to the committee and was ably assisted in preparing drafts and commentaries by John A. Spade. The judicial council committee proposed a draft of evidence rules that became H.B. 1009, 10th Hawaii Leg., 1st Sess. (1979). Legislative action was again deferred pending interim study by a joint committee co-chaired by State Senator Dennis E. O'Connor and State Representative Dennis R. Yamada, the respective chairmen of the senate and house judiciary committees. Interim committee membership included State Senator Patricia F. Saiki and Representatives Russell Blair, Herbert J. Honda, Donna Ikeda, Kenneth Lee, Yoshiro Nakamura, and Katsuya Yamada. The author served as reporter to the interim committee, whose final product became S.B. 1827-80, 10th Hawaii Leg., 2d Sess. (1980).

[4] HAWAII R. EVID. 102. *Accord*, FED. R. EVID. 102.

[5] CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 2-3 (1980).

rules generally, to suggest interrelationships that may not be fully apparent, and to underscore instances in which the rules effect changes in existing Hawaii law.

I. General Provisions

Article I provides guidance for the courts in construing the rules and in determining questions of admissibility generally. The Federal Rules of Evidence[6] served as the model for the Hawaii rules, and many of the rules are identical with or closely track their federal counterparts. The interpretive commentary accompanying the federal rules[7] thus will be useful in construing many of the Hawaii rules. In addition, the Hawaii rules have their own commentaries, which are published together with the rules in the Hawaii Revised Statutes.[8] Hawaii rule 102.1 provides that these commentaries "may be used as an aid in understanding the rules, but not as evidence of legislative intent."

Rule 102.1 is similar to a Hawaii Penal Code provision that limits the effect of the penal code commentary.[9] The principal purpose of these provisions, according to the relevant penal code commentary, is to express "the strong judicial deference given legislative committee reports and other evidence of legislative intent authored by the Legislature or its staff."[10] In other words, legislative committee reports,[11] where applicable,

---

[6] Fed. R. Evid. 101 to 1103, *reprinted in* 28 U.S.C. app. (1976 & Supp. III 1979). Preliminary drafts of proposed federal evidence rules are found in 46 F.R.D. 161 (1969), and 51 F.R.D. 315 (1971). On November 20, 1972, the Supreme Court prescribed Federal Rules of Evidence for United States Courts and Magistrates, Reporter's Note, 409 U.S. 1132 (1973); 56 F.R.D. 184 (1972), which were thereafter modified and, as modified, finally approved by Congress in 1975, Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. Some of the Hawaii rules, especially those relating to matters of privilege, are based on the Supreme Court's 1972 proposals. Sources are in all instances noted in the Hawaii rules' commentaries.

[7] 28 U.S.C. app., at 539-605 notes (1976) (Notes of Advisory Committee on Proposed Rules). In addition, there are House, Senate, and Conference Committee Reports to the federal rules. H.R. Conf. Rep. No. 93-1597, S. Rep. No. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7051; H.R. Rep. No. 93-650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075. *See generally Symposium—The Federal Rules of Evidence*, 71 Nw. U.L. Rev. 634 (1976). For a comprehensive treatment of the federal rules, see 1-5 J. Weinstein & M. Berger, Weinstein's Evidence (1978-1980) [hereinafter cited as Weinstein's Evidence].

[8] *See* S.B. 1827-80, S.D. 1, H.D. 1, C.D. 1, 10th Hawaii Leg., 2d Sess. § 16 (1980).

[9] Hawaii Rev. Stat. § 701-105 (1976).

[10] *Id.* commentary.

[11] The legislative history of the Hawaii rules is reflected in the original bill and each draft of the legislation which finally emerged as S.B. 1827-80, S.D. 1, H.D. 1, C.D. 1, 10th Hawaii Leg., 2d Sess. (1980). The legislative reports are S. Spec. Comm. Rep. No. 2, H. Spec. Comm. Rep. No. 4, S. Stand. Comm. Rep. No. 22-80, H. Stand. Comm. Rep. No. 712-80, Conf. Comm. Rep. No. 80-80, 10th Hawaii Leg., 2d Sess. (1980). The senate report points out that "[a]lthough the commentary to the Hawaii Rules of Evidence will not reflect legislative intent, it will provide discussions of the origin and supporting authorities for each rule, and in

are to be given primary and controlling weight in ascertaining legislative intent, and the commentaries are secondary in importance and authority. The Hawaii Supreme Court recently pointed out in reference to the penal code construction provision that "the commentary while not evidence thereof . . . is nevertheless expressive of the legislative intent."[12] Moreover, the evidence rules commentaries, unlike the penal code commentaries, were modified during the legislative session and were distributed to the legislators before their final action on the evidence rules package.[13]

Except in articles III and V, each of the commentaries specifies whether the rule is identical with or differs from its federal rule counterpart and, where different, identifies the precise language variation. This mechanism provides the reader with an immediate answer to the question whether, and to what extent, the counterpart federal rule and its accompanying commentary and history will be useful as a further guide to statutory construction. In addition, each commentary cites relevant prior Hawaii statutory and decisional law and indicates whether the prior law is preserved, modified, or entirely superseded by the new rule.

Article III, dealing with presumptions, is largely based on the California Evidence Code treatment of presumptions,[14] and the article III commentaries refer to the relevant California code provisions.[15] Article V, which contains the privilege rules, resembles the Uniform Rules of Evidence[16] and the United States Supreme Court's proposed privilege rules[17] which were not approved by Congress but which contained commentaries that are appropriately mentioned in the article V commentaries.[18] In short, there is a wealth of useful constructional material available to the consumers of this comprehensive legislative product.

Rule 103, entitled "Rulings on evidence," governs the procedural context for proffers, objections, and judicial rulings concerning items of evidence in general. In addition, the rule establishes a harmless error standard by specifying that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party

---

that manner function to provide the desired detailed discussions of these rules." S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 6-7 (1980).

[12] State v. Alo, 57 Hawaii 418, 426-27, 558 P.2d 1012, 1017 (1976), *cert. denied*, 431 U.S. 922 (1977); *see* State v. Aiu, 59 Hawaii 92, 98, 576 P.2d 1044, 1049 (1978); State v. Anderson, 58 Hawaii 479, 483 n.5, 572 P.2d 159, 162 n.5 (1977); State v. Nobriga, 56 Hawaii 75, 77, 527 P.2d 1269, 1273 (1974).

[13] Receipt of the commentaries was acknowledged in the conference committee report immediately preceding passage of the rules, CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 10 (1980).

[14] *See* CAL. EVID. CODE §§ 600-669 (West 1966 & Supp. 1980).

[15] *See, e.g.*, HAWAII R. EVID. 301 commentary.

[16] UNIFORM RULES OF EVIDENCE, in 13 UNIFORM LAWS ANNOTATED 209 (West 1980).

[17] *See* Fed. R. Evid. 501-513, 56 F.R.D. 230-61 (1972). The history of the federal rules is described briefly in note 6 *supra*.

[18] *See, e.g.*, HAWAII R. EVID. 502 commentary.

is affected."[19] This provision mirrors comparable standards found in the Hawaii Supreme Court's civil and criminal procedure rules.[20] Rule 103 is designed primarily to assure an adequate record, for appellate purposes, of any objection to the action of the trial court on an evidence point. If the trial court admits the questioned evidence, there must be "a timely objection or motion to strike . . . stating the specific ground of objection, if the specific ground was not apparent from the context."[21] If the trial court excludes proffered evidence, "the substance of the evidence . . . [must be] made known to the court by offer or . . . [be] apparent from the context within which questions were asked."[22] The rule also directs the trial judge to conduct jury trials "so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury."[23] These elementary precepts are familiar to all experienced trial lawyers, but their recitation in the rules is designed to upgrade the general practice before trial courts and to facilitate informed appellate review of evidence points.

Rule 104, entitled "Preliminary questions," governs those situations where the judicial determination of admissibility of a particular evidence item depends upon the existence of specified foundational facts. For example, many of the privilege rules in article V apply only when the conversation or communication in issue was intended to be confidential when spoken.[24] Likewise, witnesses are qualified to testify, under rule 602, only when their testimony derives from "personal knowledge of the matter." Similarly, rule 804's exceptions to the hearsay ban require a preliminary determination that the declarant is "unavailable as a witness" as that phrase is defined in rule 804(a).[25] Rule 104(a) specifies that such preliminary factual determinations are to be made by the judge and that in making such determinations "the court is not bound by the rules of evidence except those with respect to privileges."[26]

---

[19] *Id.* 103(a). The timing of the court's ruling may contribute to the prejudicial effect of improper testimony. *See* Chung v. Kaonohi Center Co., No. 6190, slip op. at 4-6 (Hawaii Sup. Ct. Oct. 8, 1980).

[20] HAWAII R. CIV. P. 61; HAWAII R. PENAL P. 52(a).

[21] HAWAII R. EVID. 103(a)(1).

[22] *Id.* 103(a)(2).

[23] *Id.* 103(c).

[24] *See* text accompanying notes 122, 127-32 *infra*.

[25] See text accompanying notes 244-65 *infra*.

[26] Rule 104(b), entitled "Relevancy conditioned on fact," establishes a limited exception to rule 104(a)'s allocation of preliminary fact determinations to the judge's province. In a few situations, the most obvious of which is the identification or authentication requirement as applied to real evidence in article IX, the relevance of a particular item, such as a document, to a lawsuit depends entirely upon a foundational fact. In the document situation, the fact is authorship, which is determinative of relevance, not in the rule 401 sense but in an absolute sense; authorship is, however, also a condition of admissibility under rule 901. In this circumstance rule 104(b) entrusts the preliminary fact determination to the jury:

Entrusting preliminary questions to the court is standard common-law practice, but the question of applicability of the rules at this stage is a matter about which the common-law courts were unsettled.[27] The commentary to rule 104(a) quotes from the commentary to identical federal rule 104(a): "[T]he judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay. This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence."[28] Thus, for example, a hearsay statement offered as an "excited utterance" under rule 803(b)(2) may itself evidence the relevant foundational precondition that "the declarant was under the stress of excitement" when she spoke.[29] Rule 104(c) requires that preliminary questions concerning admissibility of confessions be held outside the jury's hearing, and that other preliminary determinations similarly be removed from jury notice "when the interests of justice require or, when the accused is a witness, if he so requests."[30]

Rule 105 deals with the situation, not infrequently encountered, where evidence "is admissible as to one party or for one purpose but not admissible as to another party or for another purpose." A typical instance is the case where a party's prior admission is offered against him under rule 803(a)[31] in a lawsuit involving multiple parties. As to other parties, the statement in question is inadmissible hearsay, and rule 105 accordingly provides that "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." An example of evidence admissible for one purpose but not another is a prior inconsistent oral statement used to impeach the credibility of a witness under rule 613. The statement may be considered only in the credibility assessment and not to establish the truth of its contents,[32] and the jury should be so instructed pursuant to rule 105.

"When the *relevancy* of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." HAWAII R. EVID. 104 (b) (emphasis added). *See generally* Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435 (1980).

[27] *See* MCCORMICK ON EIVDENCE § 53, at 122-23 n.91 (E. Cleary ed. 2d ed. 1972 & Supp. 1978).

[28] 28 U.S.C. app., at 542 note (1976) (Notes of Advisory Committee on Proposed Rules), *quoted in* HAWAII R. EVID. 104(a) commentary.

[29] See note 229 *infra*.

[30] *See also* HAWAII R. EVID. 412(c)(2) (in camera hearing on admissibility of rape victim's prior sexual conduct); HAWAII REV. STAT. § 707-742(a)(3) (Supp. 1979) (repealed 1980) (closed hearing). See text accompanying notes 100-04 *infra*.

[31] See text accompanying notes 219-25 *infra*.

[32] See text accompanying notes 170-75, 210-15 *infra*.

II. JUDICIAL NOTICE

Article II governs those situations where a court may declare a relevant fact or a proposition of law established without receiving evidence or proof. Rule 201 deals with judicial notice of adjudicative facts, and rule 202 is concerned with judicial notice of law.

Factual elements of claims or defenses are established typically through the introduction of evidence, and the rules of evidence are designed generally to provide criteria and standards for admissibility determinations. Judicial notice of facts, however, dispenses with the requirement of evidence and enables the court to "instruct the jury to accept as conclusive any fact judicially noticed."[33] The criterion for such an action, according to rule 201(b), is that the fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." In other words, a fact judicially noticed must be virtually indisputable. In *Almeida v. Correa*,[34] an appeal from a determination of paternity, the trial court had instructed the jury that, subject to individual variations, the duration of a pregnancy is 270 days. This instruction was challenged on appeal because no evidence had been introduced to establish the proposition. The Hawaii Supreme Court approved the instruction because it "properly covered matters that were appropriate for judicial notice."[35] "A fact is a proper subject for judicial notice," concluded the court, "if it is common knowledge or easily verifiable."[36] Rule 201 is to the same effect.

Rule 201, as its title points out, deals with judicial notice only of "adjudicative" facts. As the commentary indicates, adjudicative facts are the facts relevant to the dispute between the parties. Another type of judicial notice, not treated in these rules or in the federal rules, concerns "legislative" facts, which include all the material that a court may consider when exercising its lawmaking function.[37]

Almeida v. Correa again provides a useful example. In holding that a child cannot be exhibited to the jury for a resemblance comparison with the putative father on the issue of paternity, the supreme court surveyed the literature of genetics and physical anthropology to determine the general relevance of resemblance evidence. Although the dissent argued that none of this literature had been subjected to adversary treatment at the

---

[33] HAWAII R. EVID. 201(g). "In a criminal case, [however,] the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." *Id.*

[34] 51 Hawaii 594, 605, 465 P.2d 564, 571 (1970), *discussed in* Part IV *infra*.

[35] *Id.*, 465 P.2d at 572.

[36] *Id.*

[37] *See* MCCORMICK ON EVIDENCE § 331 (E. Cleary ed. 2d ed. 1972 & Supp. 1978).

trial or appellate level,[38] the majority quoted Justice Oliver Wendell Holmes: "[T]he court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law."[39] In *State v. Brighter*,[40] the court sustained a presumption contained in the Hawaii Penal Code against constitutional attack by noticing a New York legislative report that lent considerable support to the penal code provision. *Almeida* and *Brighter* exemplify the kind of material that trial and appellate courts may consider when making law, construing statutes, or deciding constitutional questions, but that should be distinguished from adjudicative facts treated in rule 201.

Rule 202, entitled "Judicial notice of law," enables the court to consider the common law, Federal and State Constitutions, statutes, ordinances, court rules and regulations, and foreign, international, and maritime law. Previous Hawaii statutory law was to the same effect except that foreign law was required to be pleaded and proved and could not be judicially noticed.[41]

III. PRESUMPTIONS

Article III, which closely resembles comparable provisions in the California Evidence Code,[42] states the law of presumptions in civil and criminal cases. Rule 301 sets forth definitions that are applicable only to the rules in this article. Rules 302 through 304 govern the operation of presumptions in civil cases. Rule 305 creates presumptions within the meaning of article III in instances where external statutes provide that "a fact or a group of facts is prima facie evidence of another fact."[43] Rule 306 controls the operation of all presumptions in criminal proceedings.

Inferences are a staple ingredient in our adversary factfinding system, and they invariably involve assumptions of ultimate facts that triers of fact are invited to draw from basic facts proved by the parties. Items of inferential proof are commonly referred to as circumstantial evidence, and the pervasive question of relevance, addressed in article IV, is concerned with the strength of the connection between basic and ultimate facts. Presumptions are a species of inference, but the distinction between the two is an important one. Inferences are permissive: "The trier of fact

---

[38] 51 Hawaii at 606, 465 P.2d at 572 (Kobayashi, J., dissenting).

[39] *Id.* at 597 n.1, 465 P.2d at 567 n.1 (quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924)).

[40] 61 Hawaii 99, 107-08, 595 P.2d 1072, 1077-78 (1979), *discussed in* text accompanying notes 59-62 *infra*.

[41] HAWAII REV. STAT. ch. 623 (1976) (repealed 1980).

[42] See note 14 *supra*. *See generally Symposium—Rebuttable Criminal and Civil Presumptions: California's Statutory Dichotomy*, 9 U. CAL. D. 647 (1976).

[43] *E.g.*, HAWAII REV. STAT. § 707-761(2) (Supp. 1979) (extortionate credit transaction). See text accompanying notes 57-62 *infra*.

may logically and reasonably make an assumption from another fact or group of facts found or otherwise established in the action, but is not required to do so."[44] Presumptions are coercive: once the basic facts are established, the trier of fact is compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced.[45] For example, rule 303(c)(10) provides that "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail."[46] If the proponent establishes to the satisfaction of the trier of fact that a letter was addressed correctly and mailed properly, and if no evidence of nonreceipt of the letter is presented, then the court must instruct the trier of fact to find that the addressee received the letter. It is in this sense that rule 301(1) defines a presumption as "a rebuttable assumption of fact . . . that the law requires to be made . . . from another fact or group of facts found or otherwise established in the action." In other words, a presumption necessarily imposes a burden of production of evidence to escape a directed verdict or finding of the fact presumed. The reason, as Dean Charles T. McCormick pointed out, lies in an assumption about the strength of the connection between basic and presumed facts.[47]

The principal difficulty with presumptions arises when the party against whom a presumption operates offers evidence of the nonexistence of the ultimate or presumed fact. One school of thought, reflected in the federal rules' treatment of presumptions, holds that in this circumstance the presumption is converted automatically into a permissive inference and has no impact on the previously allocated burden of proof with respect to the ultimate fact.[48] The contending theory is reflected in the Uni-

---

[44] HAWAII R. EVID. 301(2)(B). This is precisely the operational force of the doctrine of res ipsa loquitur, which raises a rebuttable inference of negligence, *see, e.g.*, Stryker v. Queen's Medical Center, 60 Hawaii 214, 587 P.2d 1229 (1978); Turner v. Willis, 59 Hawaii 319, 582 P.2d 710 (1978) (both cases deal with jury instructions), *discussed in* Koshiba, *Torts and Workers' Compensation, 1978 Survey of Hawaii Law*, 2 U. HAWAII L. REV. 209, 223-26 (1979), and should lead to a directed verdict where the evidence inescapably compels the inference of negligence, Winter v. Scherman, 57 Hawaii 279, 283, 554 P.2d 1137, 1140 (1976).

[45] The Statement applies only to presumptions in civil cases; criminal presumptions, which are always permissive, are discussed in text accompanying notes 56-62 infra.

[46] *Cf.* State v. Martin, No. 6934, slip op. at 12-13 (Hawaii Sup. Ct. Aug. 19, 1980) (upholding conviction based on evidence showing social security payments were correctly addressed to defendant to prove receipt of funds in theft prosecution for welfare fraud).

[47] *See* MCCORMICK ON EVIDENCE § 343, at 807 (E. Cleary ed. 2d ed. 1972) [hereinafter cited as MCCORMICK].

[48] Although the federal rule provides that a presumption imposes "the burden of going forward with evidence to rebut or meet the presumption," FED. R. EVID. 301, the Conference Report on the rule says that the effect is only "to get a party past an adverse party's motion to dismiss," H.R. CONF. REP. No. 93-1597, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7099. Even in the absence of rebutting evidence, the court should instruct the jury that "it may presume the existence of the presumed fact." *Id.* Thus, federal rule 301 arguably does not even create a presumption in the Hawaii rule sense. Professor David W. Louisell points out that the quoted language "seems to confuse presump-

form Rules of Evidence: "[A] presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."[49] The California scheme of presumptions commended itself to the drafters of the Hawaii rules because it recognizes both sorts of presumptions in a comprehensive classification system. Thus, Hawaii rule 302 specifies that in civil cases "a presumption imposes on the party against whom it is directed either (1) the burden of producing evidence, or (2) the burden of proof."[50] Accordingly, rule 303 sets forth those presumptions that impose only the burden of producing evidence, and rule 304 lists those that impose or shift the burden of proof.

Why two schemes when one arguably would do? The reason is found in the arguments advanced by the competing schools of thought. Some presumptions, such as the one concerning receipt of a letter, have been established because, in addition to probability considerations, direct evidence of the ultimate fact is typically in the possession of the party against whom the presumption operates. These presumptions are designed primarily to shift the burden of producing evidence of the nonexistence of the presumed fact, but as soon as such evidence appears, the underlying policy has been implemented and there is no reason to shift the burden of proof. Presumptions of this class are defined in rule 303(a)[51] and collected in rule 303(c). The collection is not exclusive because presumptions are creatures of common-law evolution. Accordingly, subsection (c) lists fifteen presumptions and provides for inclusion of all others "established by law that fall within the criteria of subsection (a) of this rule."[52] Subsection (b) defines the effect of a burden-of-production presumption:

> [T]he trier of fact [is required] to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case no instruction on presumption shall be given and the trier of fact shall determine the existence or nonexistence of the presumed

---

tions with inferences," Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 VA. L. REV. 281, 289 (1977) (footnote omitted). Professor Louisell recommends that the courts disregard the Federal Conference Report because it "misapprehends the very issue to which it is addressed." *Id.* at 320. He recommends a comprehensive scheme for instructing juries about presumptions under federal rule 301. *Id.* at 305-20.

[49] UNIFORM RULE OF EVIDENCE 301, in 13 UNIFORM LAWS ANNOTATED 227 (West 1980). *See generally* Mueller, *Instructing the Jury Upon Presumptions in Civil Cases: Comparing Federal Rule 301 with Uniform Rule 301*, XII LAND & WATER L. REV. 219 (1977) (advocating the uniform rule).

[50] HAWAII R. EVID. 302(a)(1)-(2).

[51] "A presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied imposes on the party against whom it is directed the burden of producing evidence." *Id.* 303(a).

[52] *Id.* 303(c).

fact from the evidence and without regard to the presumption.[53]

On the other hand, a number of presumptions are designed to implement important public policies. A good example is found in rule 304(c)(7), establishing a presumption of death in the case of "[a] person who is absent for a continuous period of five years, during which time he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry." This presumption is found also in the probate code,[54] and it facilitates the settlement and distribution of estates. The illustrative presumptions collected in rule 304(c) impose the burden of proof on the party against whom one of them operates: "Except as otherwise provided by law or by these rules, proof by a preponderance of the evidence is necessary and sufficient to rebut a presumption established under . . . [rule 304]."[55] Rule 304(a) establishes the criterion for classification of unspecified presumptions that should be similarly treated, "implement[ation of] a public policy other than, or in addition to, facilitating the determination of the particular action in which the presumption is applied."

Litigants and judges should thus have little difficulty with civil presumptions under article III. The more commonly invoked ones are collected in rules 303(c) and 304(c). Other presumptions can be readily classified according to the criteria of rules 303(a) and 304(a). Finally, the roles of court and trier of fact are specified in rules 303(b) and 304(b).

Rule 306 is the exclusive vehicle for criminal presumptions. Subsection (b) provides that presumptions operating against the prosecution impose "either (1) the burden of producing evidence, or (2) the burden of proof,"[56] and the references are to rules 303 and 304. In other words, presumptions against the State are governed by the civil standards just discussed. Presumptions against the accused, "recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt,"[57] are the subject of rule 306(a).

Rule 306(a)(3) makes clear that presumptions against an accused differ markedly from presumptions in civil proceedings: "The court may not direct the jury to find a presumed fact against the accused." The result is that presumptions against the accused become special inferences that are commended to the jury by the court: "[T]he court shall instruct the jury that, if it finds the basic facts beyond a reasonable doubt, it may infer the presumed fact but is not required to do so."[58] This mandate comports

---

[53] *Id.* 303(b).
[54] HAWAII REV. STAT. § 560:1-107(3) (1976).
[55] HAWAII R. EVID. 304(b).
[56] *Id.* 306(b).
[57] *Id.* 306(a)(1).
[58] *Id.* 306(a)(3).

with the due process standard recently enunciated by the Hawaii Supreme Court in *State v. Brighter*,[59] a case where the appellant had been convicted with the assistance of a statutory provision to the effect that the presence of drugs in a motor vehicle "is prima facie evidence of knowing possession thereof by each and every person in the vehicle at the time the drug was found."[60] Applying this provision, the trial court had instructed the jury that "[p]rima facie evidence of a fact is evidence which if accepted in its entirety by the trier of fact, is sufficient to prove the [presumed] fact, provided that no evidence negativing the fact, which raises a reasonable doubt in the mind of the trier of fact, is introduced."[61] This instruction, the *Brighter* court held, tended impermissibly to shift the burden of proof to the appellant and thus violated due process: "[Since] only *permissive* inferences may arise under . . . [the statutory prima facie evidence provision], the jury should have been given a clarifying instruction to the effect that it *could*—but was not *required* to—find the element of knowing possession upon proof of the underlying facts."[62]

IV. Relevance and Related Rules

Article IV defines the concept of relevance, establishes the general admissibility of relevant evidence, and includes a number of specialized rules. Relevance is the basic precondition for the receipt of all evidence. Relevance is necessary but not always sufficient.[63] Rule 401 defines "rele-

---

[59] 61 Hawaii 99, 595 P.2d 1072 (1979). *Cf.* Sandstrom v. Montana, 442 U.S. 510 (1979) (due process violated by jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts," where intent was element of crime charged).

[60] Hawaii Rev. Stat. § 712-1251(1) (1976).

[61] 61 Hawaii at 110, 595 P.2d at 1079.

[62] *Id.* at 111, 595 P.2d at 1080 (original emphasis). *Brighter* in addition held that the presumption of knowing possession is constitutionally valid only as applied to "dealership quantities" of drugs:

> Therefore, we would require that the prosecution establish beyond a reasonable doubt that the quantity of drug involved is clearly greater than a quantity which may be possessed for personal use. . . . Absent such a determination, a jury would not be justified in concluding that the statutory inference should be applied.

Id. at 109-10, 595 P.2d at 1079. *Brighter* also addressed the question of the requisite strength between basic and ultimate facts in order to sustain a criminal presumption against constitutional attack. On this point, *compare id.* at 104-05, 109, 595 P.2d at 1076, 1078, *with* County Court v. Allen, 442 U.S. 140, 163-67 (1979) (reasonable doubt standard not constitutionally required where presence of firearm in automobile creates permissive presumption of illegal possession by all occupants).

[63] Hawaii R. Evid. 402: "All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." *Compare* Michel v. Valdastri, Ltd., 59 Hawaii 53, 575 P.2d 1299 (1978) (error to disallow evidence that defendant violated Occupational Safety and Health Law (OSHL) to show negligence), *with* Taira v. Oahu Sugar Co., No. 6528 (Hawaii Ct. App. Sept. 12, 1980) (OSHL regulations and expert testimony regarding safety precautions of defendant

vant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[64] This definition mirrors the standard recently articulated by the Hawaii Supreme Court.[65]

A question of relevance was one of the points on appeal in *State v. Irebaria*,[66] where the defendants were arrested in an auto at 3:10 a.m. and charged with an armed robbery that had occurred at 2:10 a.m. Among the evidence of guilt admitted by the trial court were the following items: (1) Testimony that one of the robbers carried a .22 caliber pistol and fired a shot during the robbery; (2) testimony that the other robber carried a .38 caliber revolver during the robbery; (3) a .22 caliber bullet fragment and a spent .22 caliber cartridge case found at the scene of the robbery; and (4) a .38 caliber revolver, a .22 caliber pistol, and some .38 and .22 caliber cartridges, all recovered from the trunk of the auto in which the defendants were arrested. Appealing a robbery conviction, appellant challenged the receipt of the evidence recovered from his auto on the ground that it had no relevance because no scientific evidence had been presented to identify the weapons found in the auto as the robbery weapons; moreover, the prosecution did not establish that the seized weapons even could be fired.

The *Irebaria* court rejected appellant's contention because the argument confused the concepts of relevance and sufficiency. Relevance, noted the court, requires only that the evidence possess a "legitimate tendency to establish a controverted fact."[67] "A brick is not a wall,"[68] quoted the court as it likened individually relevant items to building bricks and the sufficiency-of-evidence standard to a wall. The questioned items were not necessarily sufficient to support conviction but were relevant because of their tendency to identify appellant as one of the robbers. "The suffi-

---

properly excluded as irrelevant).

[64] HAWAII R. EVID. 401; *accord*, FED. R. EVID. 401. *See* Kim v. State, ___ Hawaii ___, 616 P.2d 1376 (1980) (welfare records showing public school student's propensity for violence properly excluded as irrelevant to issue of awareness in suit against State for negligent supervision resulting in serious injury to plaintiff, a classmate, because school authorities had no access to same records). So defined, relevance incorporates the old concept of materiality. Relevance was previously defined as "the tendency of the evidence to establish a material proposition." MCCORMICK, *supra* note 47, at § 185, at 435 (footnote omitted). The new definition includes the notion of materiality by specifying that the ultimate fact be "of consequence to the determination of the action." HAWAII R. EVID. 401. Accordingly, as the commentary points out, "the words 'material' and 'materiality' do not appear in these rules." *Id.* commentary.

[65] "Evidence is relevant if it tends to prove a fact in controversy or renders a matter in issue more or less probable." State v. Smith, 59 Hawaii 565, 567, 583 P.2d 347, 349 (1978).

[66] 55 Hawaii 353, 519 P.2d 1246 (1974).

[67] Bonacon v. Wax, 37 Hawaii 57, 61 (1945), *quoted in* 55 Hawaii at 356, 519 P.2d at 1249.

[68] MCCORMICK, *supra* note 47, at § 185, at 436, *quoted in* 55 Hawaii at 356, 519 P.2d at 1249.

ciency standard should apply only when all the bricks of individually insufficient [but relevant] evidence are in place and the wall itself is tested."[69] Rule 401 is to the same effect because it requires only that the proffered item have "any tendency" to establish or negate a consequential fact.

Suppose, however, that the *Irebaria* defendants had been arrested in possession of the same arsenal not one hour but one year following commission of the offense. The evidence would possess minimal relevance, and minimal relevance is all that rules 401 and 402 require. Rule 403, however, states an important qualifying principle that serves as a counterbalance to the general permissiveness of rules 401 and 402: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[70] It could be argued with some force that the minimal relevance on the legitimate issue of identity is substantially outweighed by the danger that the jury would be swayed in its decisional process by consideration of the general bad character of the defendants as gunslingers with some apparent use for guns, a consideration strictly forbidden by the general character evidence ban of rule 404.[71]

Almeida v. Correa,[72] discussed earlier in connection with the concept of judicial notice, provides another example. The principal question addressed by the Hawaii Supreme Court in *Almeida* was whether, in a paternity case, the exhibition of the child to the jury for resemblance comparison with the putative father had sufficient relevance. After a careful review of scientific principles in the fields of genetics and physical anthropology, the court held that such an exhibition would be useless to a determination of paternity and could "only serve to expose . . . [the putative father] to proven dangers."[73] In a footnote the court said that it was un-

---

[69] 55 Hawaii at 356, 519 P.2d at 1249. *Cf.* State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (police officer's assertion that seeds found in defendant's closet were marijuana seeds constituted insufficient evidence of the fact).

[70] HAWAII R. EVID. 403. *Compare* State v. Huihui, 62 Hawaii _, 612 P.2d 115 (1980) (suggestion that defendant had prior criminal record by referring to "police mug photographs" in questioning witness regarding pretrial identification constituted reversible error), *with* State v. Pulawa, 62 Hawaii _, 614 P.2d 373 (1980) (reference to "mug shot" was harmless error), *and* State v. Antone, 62 Hawaii _, _, 615 P.2d 101, 107 (1980) (failure to object to evidence of defendant's prior arrest record for same type of crime was harmless in bench trial), *and* State v. Kahinu, 53 Hawaii 536, 498 P.2d 635 (1972), *cert. denied*, 409 U.S. 1126 (1973) (reference to prior arrest was harmless error where court immediately gave cautionary instruction).

[71] *Cf.* People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930) (reversible error to admit evidence that defendant owned weapons, which were not used in the alleged crime, to persuade jury of his murderous propensity).

[72] 51 Hawaii 594, 465 P.2d 564 (1970), *discussed in* Part II *supra*.

[73] *Id.* at 603, 465 P.2d at 571. The court determined that the issue of *specific* resemblance

necessary to "balance probative weight against jury sympathy where there is no probative weight in an exhibition to a layman,"[74] thus eschewing reliance on the maxim expressed now in rule 403. Perusal of the *Almeida* opinion, however, suggests that the rule 403 principle would have been an equally appropriate ground for decision, especially in view of the fact that some other jurisdictions allow exhibition of the child in a paternity case.[75] The case also illustrates an obvious difficulty: relevance and prejudicial impact necessarily imply a degree of subjective judgment when all is said and done. Although the court relied on scientific exegesis in *Almeida*, most relevance questions require common-sense thinking about the relationships of things to other things.

Another situation with significant potential for prejudice is presented when the court considers admitting evidence with a limiting instruction under rule 105.[76] Here the issue is whether probative value is substantially outweighed by the danger that the trier of fact will disregard the instruction and go on to consider the evidence for the forbidden purpose, evaluated with regard to the likelihood that such improper consideration will skew the result. Unfair prejudice, as the commentary to rule 403 points out, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[77] Rule 403 thus calls upon the court to anticipate and to evaluate the jury's probable mental operations with respect to a proffered item of evidence. Moreover, this judgment needs to take into account the relationship between the proffered item and other items already admitted or anticipated in evidence, in addition to the general atmosphere at trial. It is for these reasons that the 403 balance is addressed to the discretion of the trial court. Rules 401, 402, and 403 are fundamental and pervasive. They are the backbone of the entire body of evidence law.

Rules 404 and 405 are concerned with character evidence. That a person behaved in a certain way on a particular occasion could be shown, given the rule 401 definition, by evidence of her general character or propensity to behave that way on any like occasion. Character could be proved in two ways: witnesses could be called to state their opinion of the person's character or their knowledge of her reputation for a particular trait of character, or evidence could be offered that on occasions other than the one in question she behaved in a manner consistent with the proponent's theory of her behavior on the occasion in question.[78] Rule

---

is relevant in determination of paternity but only where resemblance is measured scientifically. Therefore, only expert testimony on the issue would be admissible. *Id.* at 602-03, 465 P.2d at 570-71.

[74] *Id.* at 603 n.11, 465 P.2d at 570 n.11.

[75] MCCORMICK, *supra* note 47, at § 212, at 526 n.20.

[76] See the discussion of rule 105 in Part I *supra*.

[77] HAWAII R. EVID. 403 commentary (quoting 28 U.S.C. app., at 550 note 1976)).

[78] Specific instances of prior conduct are a species of character evidence because the connection between the prior conduct and the conduct in issue requires an intervening infer-

404, however, interposes a general bar, with limited exceptions, to character evidence because, as the commentary to the rule explains:

> Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good . . . [woman] and to punish the bad . . . [woman] because of their respective characters despite what the evidence in the case shows actually happened.[79]

So understood, rule 404 represents a specialized application of the 403 principle.

The exceptions to rule 404(a)'s character evidence exclusion are that (1) the accused in a criminal case can offer evidence of a personal trait inconsistent with commission of the crime charged,[80] (2) the character of certain crime victims can be proved by accused[81] in criminal cases,[82] and (3) the character of witnesses to be untruthful or, in limited circumstances, to testify truthfully can be proved under rules 608 and 609.[83] In these limited instances, rule 405 specifies that the proof may be by reputation or by direct opinion evidence but generally not by instances of conduct on other occasions. The common law did not allow proof of character by opinion, and, consistent with federal rule 405, this rule thus effects a change in Hawaii law.[84]

Rule 404(b) precludes the use of specific instances of conduct ("other crimes, wrongs, or acts") "to prove the character of a person in order to show that he acted in conformity therewith."[85] The rule typically bars the

---

ence or assumption of character or propensity for that particular kind of behavior.

[79] HAWAII R. EVID. 404 commentary (quoting 28 U.S.C. app., at 551 note (1976) (Notes of Advisory Committee on Proposed Rules) (quoting CAL. LAW REVISION COMM'N, RECOMMENDATION & STUDIES 615 (1964))).

[80] HAWAII R. EVID. 404(a)(1).

[81] *Id.* 404(a)(2). Proof of character of rape and sex assault victims, however, is governed exclusively by rule 412. See text accompanying notes 100-04 *infra*. It thus appears that rule 404(a)(2) relates primarily to self-defense claims in homicide and assault cases, *e.g.*, State v. Lui, 61 Hawaii 328, 603 P.2d 151 (1979).

[82] In Feliciano v. City & County of Honolulu, 62 Hawaii __, 611 P.2d 989 (1980), a civil action for assault and battery brought under the theory of respondeat superior, the court approved evidence of the reputation of plaintiffs for violence to support the employer's assertion that its police officers reasonably feared bodily harm and to evidence plaintiffs' character and propensity to be aggressive. Although the analogy to rule 404(a)(2) in *Feliciano* is powerful because of the similarity between civil and criminal assault cases, rule 404 does not support the *Feliciano* result.

[83] HAWAII R. EVID. 404(a)(3). See text accompanying notes 146-67 *infra*.

[84] *See* State v. Faafiti, 54 Hawaii 637, 642-44, 513 P.2d 697, 701-02 (1973) (no error where trial court refused to admit testimony either as evidence of defendant's reputation in the community or as personal opinion testimony as to accused's character).

[85] *Cf.* Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977) (evidence of prior golf cart accidents properly excluded in damage suit based on negligence, breach of warranty, and strict liability theories).

prosecutor from proving that the defendant committed other crimes to evidence his probable commission of the one charged.[86] Many exceptions have been engrafted to the rule: other crimes evidence "may, however, be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident."[87] Illustrative of these exceptions is *State v. Apao*,[88] where the defendant was charged with the murder of a man "known by . . . [the defendant] to be a witness in a murder prosecution."[89] At trial the State was permitted to prove that the prior murder prosecution involved the current victim as witness and Apao as defendant. The Hawaii Supreme Court held that this evidence was properly admitted to evidence Apao's motive to kill the man who testified against him in the previous case. The holding is consistent with rules 403 and 404(b) because the prejudicial impact of the evidence did not outweigh its legitimate value in the two-step inference from prior crime to motive to present guilt.

The Hawaii Supreme Court has previously employed two formulations of the "other crimes" rule; one, an exclusionary rule with exceptions resembling rule 404(b); the other, an apparently more permissive device allowing general admissibility "except when . . . [the evidence] shows merely criminal disposition."[90] Federal rule 404(b) adheres to the exclusionary formulation with exceptions, and the Hawaii rule is similar but was adapted[91] to embrace the essential spirit of both formulations. In any event, the precise language of the rule, as the Hawaii court has recognized, should always yield to the trial court's paramount obligation in assessing "relevancy to proof of an element of the crime charged, balanc[ing] . . . probative value against prejudicial effect, and [using] . . . the exception categories primarily as indices of relevancy."[92] The court thus recognized that the principles now codified in rules 403 and 404(b) are interdependent in the consideration of "other crimes, wrongs, or acts" evidence.

---

[86] *See, e.g.*, State v. Pokini, 57 Hawaii 17, 548 P.2d 1397 (1976).

[87] HAWAII R. EVID. 404(b). *See* State v. Thompson, 1 Haw. App. _, 613 P.2d 909 (1980) (evidence that defendant forged check endorsement of one hospital patient admissible to prove element of intent in forgery prosecution involving another patient's check).

[88] 59 Hawaii 625, 586 P.2d 250 (1978).

[89] *Id.* at 627, 586 P.2d at 253.

[90] People v. Peete, 28 Cal. 2d 306, 314, 169 P.2d 924, 929 (1946), *quoted in* State v. Iaukea, 56 Hawaii 343, 349, 537 P.2d 724, 729 (1975). *See* State v. Agnasan, 62 Hawaii _, 614 P.2d 393 (1980); State v. Murphy, 59 Hawaii 1, 8-11, 575 P.2d 448, 454-56 (1978).

[91] The permissive sentence in the federal rule reads: "It may, however, be admissible *for other purposes*, such as proof of motive . . . ." FED. R. EVID. 404(b) (emphasis added). The Hawaii formulation substitutes "where such evidence is probative of any other fact that is of consequence to the determination of the action," HAWAII R. EVID. 404(b), for the italicized phrase in the federal rule.

[92] State v. Iaukea, 56 Hawaii 343, 351, 537 P.2d 724, 730 (1975).

The Hawaii drafters also added "modus operandi" to the catalog of rule 404(b) exceptions. This is an appropriate addition because in a given case the details of commission of the prior crime and of the crime charged may be so strikingly similar and distinctive "as to be like a signature."[93] Dean McCormick cautioned, however, that "much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts."[94] This is because repetitious criminality demonstrates nothing more than forbidden bad character or propensity. The theory of the modus operandi exception is that two crimes may possess such distinctive similarities as to mark them the probable handiwork of the same person, thereby identifying the defendant as the present culprit.[95]

Most of the remaining rules in article IV state settled principles.[96] For example, rule 406 provides that when prior instances of conduct amount to a habit or "routine practice," then evidence of the habit or practice is admissible "to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"Subsequent remedial measures," such as equipment repairs or employee discharges, effected after an occurrence currently being litigated, generally are prohibited by rule 407 to prove "negligence or culpable conduct in connection with the event." Rule 407 contains exceptions[97] and goes beyond federal rule 407 in allowing subsequent remedial measures to prove "dangerous defect[s] in products liability cases." As the commentary points out, this action codifies the result reached by the California Supreme Court in *Ault v. International Harvester Co.*,[98] where the trial court admitted subsequent repairs made to the International Scout in a

---

[93] MCCORMICK, *supra* note 47, at § 190, at 449 (footnote omitted).

[94] *Id.*

[95] *See, e.g.*, Payne v. United States, 294 F.2d 723, 725-26 (D.C. Cir.), *cert. denied*, 368 U.S. 883 (1961); 2 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 404[09], at 404-52 to -55 (1980).

[96] Rule 408 bars evidence of "compromise or offers to compromise"; rule 409 excludes evidence of "payment of medical and similar expenses"; rule 410 interdicts evidence of withdrawn guilty pleas, nolo contendere pleas, and plea bargaining statements; and rule 411 bans evidence of liability insurance on the issue of negligence. *See also* State v. Alberti, 61 Hawaii 502, 605 P.2d 937 (1980) (where withdrawal of guilty plea was pending in federal court, admissions made to support plea are admissible in subsequent state prosecution for related offense arising out of the same conduct but would not be admissible after federal court approved withdrawal).

[97] Impeachment is one of the exceptions. *Accord*, Long Mfg., N.C., Inc. v. Nichols Tractor Co., 561 F.2d 613, 618 (5th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978) (post-accident warning letter to customers admissible to impeach defendant's witness who testified to safety of tractor design in wrongful death action based on negligence theory).

[98] 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974). Plaintiff claimed that the manufacturer's use of aluminum rather than malleable iron in construction of the gear box constituted a design defect that caused the gear box to break and the vehicle to lurch out of control and plunge 500 feet to the bottom of Nine Mile Canyon Road. Defendant substituted iron for aluminum in the manufacture of Scout gear boxes three years after the accident occurred.

products liability case. The California court recognized that the general exclusion of subsequent repairs evidence is designed to encourage, or at least not discourage, the making of repairs but held that the principle had no applicability in products liability cases:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.[99]

Rule 412 tracks a recent addition to the federal rules[100] and sharply limits evidence of the previous sexual behavior of rape and sex assault victims.[101] Prior Hawaii law entrusted the determination of admissibility of this kind of evidence to the discretion of the trial court,[102] and the evidence was sometimes admitted to establish that the victim consented to the alleged crime of rape or sodomy. Rule 412 excludes evidence of past sexual behavior of sex assault victims with persons other than the accused[103] but leaves open the door to evidence of prior sexual conduct with the accused in cases where the defense of consent is raised. This rule take precedence over the general victim character provision of rule 404(a)(2),[104] and recognizes that the evidence now excluded had little or no relevance on the consent issue. Moreover, the evidence was degrading to rape and sex assault victims, and its availability was thought to deter significant numbers of them from reporting these crimes.

---

[99] *Id.* at 120, 528 P.2d at 1152, 117 Cal. Rptr. at 816.

[100] Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046, *reprinted in* 28 U.S.C. app., at 1231 (Supp. III 1979) (FED. R. EVID. 412).

[101] Rule 412 also flatly prohibits "reputation or opinion evidence of the past sexual behavior" of such victims. See note 30 *supra* and accompanying text.

[102] HAWAII REV. STAT. § 707-742 (1976 & Supp. 1979) (repealed 1980). *See* State v. Iaukea, No. 6440 (Hawaii Sup. Ct. Aug. 29, 1980).

[103] The only exceptions are instances where the evidence is offered "upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury," HAWAII R. EVID. 412(b)(2)(A); and where the evidence is "constitutionally required to be admitted," *id.* 412(b)(1). *Cf.* Davis v. Alaska, 415 U.S. 308 (1974) (confrontation clause protects defendant's right to cross-examine juvenile regarding his status as a probationer in order to show witness' bias); Giles v. Maryland, 386 U.S. 66 (1967) (vacating post-conviction affirmance where trial court barred evidence of rape prosecutrix' status as probationer and relevant sexual history); State v. Jones, No. 6321, slip op. at 6-11 (Hawaii Sup. Ct. Oct. 7, 1980) (trial court properly excluded evidence of rape victim's prior sexual experience with another person as irrelevant to consent defense and witness' credibility).

[104] See text accompanying notes 78-84 *supra*.

V. PRIVILEGES

Article V contains a comprehensive set of privilege rules that clarify but do not modify significantly previous Hawaii law. The federal rules contain no specific rules on privilege, although the original package of proposed federal rules, submitted by the United States Supreme Court to the Congress in 1972, contained thirteen privilege rules[105] upon which the Hawaii rules are largely based. For a number of reasons, Congress scuttled the proposed privilege rules in favor of a single standard,[106] federal rule 501, that entrusts the matter of privilege in the federal courts to "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[107] The Uniform Rules of Evidence, on the other hand, contain a set of twelve privilege rules,[108] most of which are textually similar to the unenacted federal rules and to the rules contained in Hawaii's article V.

Rule 501 states the basic principle that no privileges are to be recognized "[e]xcept as otherwise required by the Constitution of the United States, the Constitution of the State of Hawaii, or provided by Act of Congress or Hawaii statute, and except as provided in these rules or in other rules adopted by the Supreme Court of the State of Hawaii." This truism embodies the idea that every person must respond to court process and provide relevant evidence unless a specific privilege can be established.[109] The article V collection includes the well-established lawyer-cli-

---

[105] Fed. R. Evid. 501-513, 56 F.R.D. 230-61 (1972).

[106] The original privilege rules were the most controversial part of the Supreme Court's submission, see note 6 *supra*. Critics charged that the privilege rules were matters of substance and, as such, without the Court's power to prescribe "practice and procedure" rules; that the rules impinged on state law and policy and hence violated the principle of federalism; and that the rules would "freeze" the federal privilege law. Specific provisions were attacked. "The controversy convinced Congress that codification of privileges was dangerous and might forestall passage of the rules." 2 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 501[01], at 501-17 (1980) (footnote omitted). The result was enactment of a single rule, FED. R. EVID. 501, *discussed in* text above. For a discussion of relevant judicial rulemaking power in Hawaii, see Richardson, *supra* note 3, at 33-38.

[107] FED. R. EVID. 501. The rule also provides that, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." *Id.*

[108] UNIFORM RULES OF EVIDENCE 501-512, in 13 UNIFORM LAWS ANNOTATED 248-66 (West 1980).

[109] *See* Trammel v. United States, 445 U.S. 40, 50 (1980); United States v. Nixon, 418 U.S. 683, 709 (1974); Branzburg v. Hayes, 408 U.S. 665, 686, 688 (1972). In addition rule 501 bars common-law development of new privileges. *Compare* Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979) (common-law news reporter privilege), *with In re* Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961) (declining to create news reporter privilege). The recently adopted constitutional amendment protecting the right to privacy, HAWAII CONST. art. I, § 6, may provide an independent basis for excluding evidence. The 1978 amendment is a combination of similar provisions in the Alaska and Montana constitutions, Comm. on Bill of Rights, Suffrage and Elections, Informational Panel Minutes, 3d Hawaii Const. Conv. 1 (1978) (remarks of Professor Jon Van Dyke) (on file at Hawaii State Archives). *See* ALASKA

ent,[110] physician-patient,[111] spousal,[112] clergywoman-penitent,[113] political vote,[114] trade secret,[115] self-incrimination,[116] and informer's identity[117] privileges. In addition, rule 504.1 presents a psychologist-client privilege, applicable to psychologists certified under the Hawaii statutes[118] and their patients or clients. The purpose of these rules is to facilitate communication and to protect privacy.[119]

The lawyer-client, physician-patient, psychologist-client, and clergyman privileges, found in rules 503, 504, 504.1, and 506, respectively, are similar in nature. All provide that the person who seeks advice or counselling is the holder and beneficiary of the privilege and that both parties to the privileged material may claim the privilege but only on behalf of the holder.[120] Accordingly, all provide that the definition of the professional person includes not only one authorized or certified to engage in his calling but also one "reasonably believed" by the client or patient to be so authorized.[121] All specify that the subject matter of the privilege is limited to confidential communications, and all define confidential communications as those made privately and "not intended to be disclosed" to other persons except when disclosure would be in furtherance of the

---

CONST. art. I, § 22; MONT. CONST. art. II, § 10. The Alaska Supreme Court rejected a criminal defendant's claimed psychotherapist privilege for lack of state action, Allred v. State, 554 P.2d 411 (Alaska 1976) (establishing common-law psychotherapist privilege but finding it inapplicable under the circumstances), but the Montana Supreme Court has invoked the exclusionary rule even to protect against invasion of privacy by private parties, State v. Coburn, 165 Mont. 488, 530 P.2d 442 (1974); State v. Brecht, 157 Mont. 264, 485 P.2d 47 (1971). *See also* State v. Boynton, 58 Hawaii 530, 574 P.2d 1330 (1978) (declining to decide whether searches by private parties may be subject to the exclusionary rule as in *Coburn*).

[110] HAWAII R. EVID. 503. For an extensive discussion of the question whether a client's whereabouts is privileged material, see Sapp v. Wong, 62 Hawaii _, _, 609 P.2d 137, 140-41 (1980) (information not privileged under the circumstances).

[111] HAWAII R. EVID. 504.

[112] *Id.* 505.

[113] *Id.* 506.

[114] *Id.* 507.

[115] *Id.* 508.

[116] *Id.* 509.

[117] *Id.* 510.

[118] *Id.* 504.1(a)(2). *See* HAWAII REV. STAT. ch. 465 (1976 & Supp. 1979), *as amended by* Act 91, 1980 Hawaii Sess. Laws 141. See text accompanying note 121 *infra*.

[119] The privilege rules constitute a major qualification to the rule 402 maxim that all relevant evidence is admissible, *see* note 63 *supra*. Because of this, and because the specific privileges also create exceptions to the limiting principle of rule 501, construction of the privilege rules will call for balancing the privilege policies against the general propositions of rules 402 and 501. Specific privilege policies are elaborated in the commentaries to the individual privilege rules. Article five, of course, contains the only evidence rules binding upon the court in hearing preliminary matters, *see* text accompanying note 26 *supra*.

[120] In the case of lawyers, rule 503(c) directs: "The person who was the lawyer or the lawyer's representative at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client."

[121] HAWAII R. EVID. 503(a)(3), 504(a)(2), 504.1(a)(2), 506(a)(1).

object of the consultation.[122] All except the clergyman privilege contain a standard list of exceptions. Finally, all provide that the privilege survives the death of the privilege holder.

The lawyer-client privilege applies to corporations when they seek or obtain professional legal services.[123] There is a good deal of case law on the question who, among all the employees of a corporation, embodies or speaks for the corporation when interviewed by a lawyer, as contrasted with employees who are interviewed merely as witnesses to events about which the corporation may anticipate litigation. Rule 503 answers this question by specifying that "representative[s] of the client" include only those "having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client."[124] This formulation is recommended in the Uniform Rules of Evidence,[125] and it resembles the "control group" test rejected in 1981 by the Supreme Court in *Upjohn Co. v. United States.*[126]

The spousal privilege has two discrete aspects. Rule 505(a), applicable only in criminal cases, provides "the spouse of the accused [with] a privilege not to testify against the accused." This modifies prior Hawaii law, which allowed either the accused or the testifying spouse to invoke the criminal disqualification,[127] thereby flatly barring testimony. The Hawaii drafters were persuaded by the recent United States Supreme Court decision in *Trammel v. United States,*[128] which held, as a matter of common-law development, that a criminal accused could not prevent his spouse from testifying against him. The purpose of the privilege is the protection of marital harmony, and the *Trammel* Court reasoned that whenever one spouse is willing to testify against the other in a criminal case "there is probably little in the way of marital harmony for the privilege to pre-

---

[122] *Id.* 503(a)(5), 504(a)(3), 504.1(a)(3); *accord,* 506(a)(2).

[123] *Id.* 503(a)(1).

[124] *Id.* 503(a)(2).

[125] UNIFORM RULE OF EVIDENCE 502(a)(2), in 13 UNIFORM LAWS ANNOTATED 249 (West 1980).

[126] 49 U.S.L.W. 4093 (U.S. Jan. 13, 1981) (No. 79-886). Hawaii's rule is based on City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483, 485-86 (E.D. Pa.), *petition for mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963), which denied the privilege where the matter discussed with the corporation's attorney was very important to the highest management level, and the employee had no substantial decisionmaking role in it.

[127] HAWAII REV. STAT. § 621-18 (1976) (repealed 1980), provided that spouses were not "competent or compellable" to give evidence against each other in criminal cases, except where the offense involved a crime against the person of the other spouse or either of their children. *See* Territory v. Alford, 39 Hawaii 460 (1952), *aff'd,* 205 F.2d 616 (9th Cir. 1953) (wife competent to testify against husband accused of forcing her into prostitution).

[128] 445 U.S. 40 (1980). The petitioner's spouse had been granted use immunity to testify against her husband who was charged with importing and conspiring to import heroin. Upon her return from Thailand, Mrs. Trammel was arrested in Hawaii after a customs search revealed she was carrying four ounces of heroin. She was later named as an unindicted co-conspirator in her husband's case.

serve."[129] For this reason, Hawaii rule 505(a) provides that the disqualification "may be claimed only by the spouse who is called to testify." Rule 505(b), applicable in civil as well as criminal cases, creates a privilege for "confidential marital communications"[130] and specifies that either spouse "has a privilege to refuse to disclose and to prevent any other person from disclosing [such a] communication."[131] The exception to the privileges of rule 505(a) and (b) applies whenever one spouse is charged with a crime against the other or against other household members.[132]

Rule 511 generally provides that a privilege is waived if the holder "voluntarily discloses or consents to disclosure of any significant part of the privileged matter." Rule 512 bars evidence of privileged material if "disclosure was (1) compelled erroneously, or (2) made without opportunity to claim the privilege." Finally, rule 513 prohibits comment by court or counsel about the fact that a person, "whether in the present proceeding or upon a prior occasion," claimed a privilege.[133] Since no inferences may be drawn by the trier of fact concerning a privilege claim, rule 513(c) specifies that "any party exercising a privilege (1) is entitled to an instruction that no inference may be drawn therefrom, or (2) is entitled to have no instruction on the matter given to the jury." This latter entitlement effects a change in Hawaii law, because the supreme court had held, in *State v. Baxter*,[134] that it was not reversible error for the trial court to deliver such a cautionary instruction even over the objection of an accused who availed himself of the self-incrimination privilege not to testify. The new rule embodies Justice Kazuhisa Abe's dissenting view in *Baxter* to the effect that the decision about the cautionary instruction should belong to the privilege claimant, especially since the instruction is viewed by many trial lawyers as a more-detrimental-than-beneficial spotlighting of the privilege claim.[135]

---

[129] *Id.* at 52. *Cf. In re* Grand Jury Empanelled Oct. 18, 1979, 49 U.S.L.W. 2066 (3d Cir. June 26, 1980) (co-conspirator spouse entitled to claim privilege).

[130] HAWAII R. EVID. 505(b). Such a privilege was previously recognized by statute, HAWAII REV. STAT. § 621-19 (1976) (repealed 1980). The Supreme Court in *Trammel* acknowledged the same independent privilege for confidential communications, 445 U.S. at 51, and expressly noted that its ruling did not "disturb" that well-established law, *id.* at 45 n.5.

[131] HAWAII R. EVID. 505(b)(2).

[132] *Id.* 505(e). This comports with prior statutory and case law, *see* note 127 *supra*.

[133] HAWAII R. EVID. 513(a). The Hawaii Supreme Court had previously prohibited comment in a civil case on the assertion of the self-incrimination privilege, Kaneshiro v. Belisario, 51 Hawaii 649, 652, 466 P.2d 452, 454 (1970). In criminal cases, prohibition of comment about the accused's assertion of the self-incrimination privilege is a constitutional imperative, *see* Griffin v. California, 380 U.S. 609 (1965). The prosecution may, however, comment upon the failure of defendant to offer the spouse as a witness to any fact material to the defense. State v. Hassard, 45 Hawaii 221, 228, 365 P.2d 202, 206 (1961).

[134] 51 Hawaii 157, 454 P.2d 366 (1969), *cert. denied*, 397 U.S. 955 (1970); *accord*, Lakeside v. Oregon, 435 U.S. 333, 340-41 (1978).

[135] 51 Hawaii at 161, 454 P.2d at 368 (Abe, J., dissenting).

VI. WITNESSES AND IMPEACHMENT

Article VI covers competency, impeachment, and other matters relating to witness interrogation. One of the most innovative provisions in the entire Code is rule 607: "The credibility of a witness may be attacked by any party, including the party calling him." Previous practice precluded a party from impeaching her own witnesses except in limited circumstances.[136] She was said to vouch for the credibility of the witnesses she called, and impeachment hardly comports with the voucher notion. Another formulation of the voucher concept considered a party to be "bound" by the testimony of her witnesses. The notion of being bound, however, did not prevent a party from calling witnesses who would testify at variance with each other. In a somewhat circular way, the notions of vouching and being bound were mainly effectuated in the impeachment limitation. Dean McCormick viewed this limitation as "a serious obstruction to the ascertainment of truth" in the context of modern litigation where parties do not choose their witnesses but rather take them where they find them.[137] Federal rule 607, with which the Hawaii rule is identical, abandoned the limitation as "based on false premises."[138] Most of the states that have reexamined evidence rules since 1975, when the federal rules were promulgated, have similarly interred the own-witness impeachment bar.[139] No grievances have been heard. The burials have been quiet and dignified.

Rules 601 through 606 relate to witness competency and largely restate existing law. Rule 601 proclaims that "[e]very person is competent to be a witness except as otherwise provided in these rules." Rule 602 requires that witnesses testify from personal knowledge of the subject matter of their testimony, and rule 603 mandates an "oath or affirmation administered in a form calculated to awaken . . . [the witness'] conscience and impress his mind with his duty to . . . [testify truthfully]." Because of the apparent sweep of rule 601, the Hawaii drafters incorporated, in rule 603.1, a provision from the California Evidence Code disqualifying as a witness any person who is incapable of expressing himself or incapable of understanding the truth-telling obligation.[140] This provision, as the commentary points out, will be primarily applicable to youthful and mentally infirm witnesses.[141]

Rules 605 and 606 render judges and jurors incompetent to testify in the trials in which they sit. Rule 606(b) governs juror testimony about

---

[136] HAWAII REV. STAT. § 621-25 (1976) (repealed 1980).

[137] MCCORMICK, *supra* note 47, at § 38, at 77.

[138] 28 U.S.C. app., at 561 note (1976).

[139] The statutes are collected in 3 WEINSTEIN'S EVIDENCE, *supra* note 7, at ¶ 607[10] (Supp. 1979).

[140] *See* CAL. EVID. CODE § 701 (West 1966); HAWAII R. EVID. 603.1 commentary.

[141] *See* State v. Antone, 62 Hawaii _, _, 615 P.2d 101, 106-07 (1980).

jury deliberations:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

This is a modification of the federal rule which additionally prohibits testimony concerning "any matter or statement occurring during the course of the jury's deliberations."[142] The Hawaii rule will allow testimony about events that occur in the jury room, the disqualification being limited to testimony about the "effect" of such events on jurors' deliberative reasoning. The difference is suggested by *Kealoha v. Tanaka*,[143] where a deliberating jury repaired to the Halekulani Hotel, consumed alcoholic beverages, and thereafter returned a hasty verdict. Although the *Kealoha* holding did not relate to juror competency,[144] the case is mentioned here because the jurors would not be competent to testify about their drinking activities under the federal rule but would qualify under the Hawaii rule. Both rules would bar testimony concerning the *effect* of the drinking on the deliberations, however. The policy, according to the commentaries to both rules, is to promote "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment."[145] The Hawaii drafters nevertheless concluded that objective forms of juror misconduct should not be insulated from subsequent scrutiny.

Rules 608, 609, 609.1, and 613 govern impeachment. Rules 608 and 609 define the scope of permissible character attacks on witness credibility.[146] Rule 608 permits a credibility attack through opinion or reputation evidence of the character of a witness for lack of veracity, and, to rebut such an attack, allows credibility support by opinion or reputation evidence of character for truthfulness.[147] Rule 608(b) prohibits the use of extrinsic evidence to prove a witness' prior behavior as it may bear on his credibility but approves cross-examination concerning such prior behavior. This formulation is often expressed as follows: The cross-examiner may inquire about the witness' employment, prior conduct, and other collateral circumstances bearing on credibility but is concluded by the answers and

---

[142] FED. R. EVID. 606(b).

[143] 45 Hawaii 457, 370 P.2d 468 (1962).

[144] The court held that consumption of liquor by the jurors did not, as a matter of law, constitute prejudice requiring a new trial and affirmed its earlier opinion that the record did not show actual prejudice in this case. *Id.* at 468, 473-74, 370 P.2d at 475, 477.

[145] 28 U.S.C. app., at 560 note (1976) (Notes of Advisory Committee on Proposed Rules), *quoted in* HAWAII R. EVID. 606 commentary.

[146] Rules 608 and 609 are among the exceptions to the general exclusion of character evidence, HAWAII R. EVID. 404(a)(3). See text accompanying notes 78-95 *supra*.

[147] HAWAII R. EVID. 608(a).

may not contradict them by calling other witnesses.[148]

In *Cozine v. Hawaiian Catamaran, Ltd.*,[149] the Hawaii Supreme Court held that the trial court's refusal to allow cross-examination about a false affidavit constituted reversible error because the witness could "be cross-examined as to specific acts affecting her credibility."[150] The *Cozine* court emphasized, however, that "[s]uch cross-examination rests in the discretion of the court, and is reviewable only for abuse of discretion."[151] Rule 608(b) expressly commits control of this kind of questioning to the court's discretion, and the commentary to rule 403 refers specifically to rule 608(b) as a prime example of the need for a discretionary balance of relevance, prejudicial impact, and jury confusion. False statements under oath, the subject matter of impeachment in *Cozine*, are devastatingly relevant to credibility, but other conduct, collateral in the sense that it bears no relation to the substantive issues in the litigated case, invariably calls for a critical assessment of relevance to credibility and counterbalancing factors. Thus, "[a] witness may not be questioned as to his involvement with drugs solely to show he is unreliable or lacks veracity."[152] The same assessment must inform the decision whether to allow impeachment by prior criminal conviction under rule 609.

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is inadmissible except when the crime is one involving dishonesty."[153] The use of the words "inadmissible except" in rule 609(a) implicitly suggests the discretionary nature of the prior-conviction impeachment decision. So understood, the rule codifies the result in *Asato v. Furtado*,[154] where the Hawaii Supreme Court approved the trial court's action disallowing impeachment by prior conviction for careless driving because the conviction bore "no rational relation to . . .

---

[148] *See* McCORMICK, *supra* note 47, at § 42, at 84.

[149] 49 Hawaii 77, 412 P.2d 669 (1966), *discussed in* Part VII *infra*. Plaintiff, a passenger on a commercial catamaran chartered by her husband, sought damages for injuries she sustained when the mast broke and struck her on the head. Defendant appealed a jury award of $12,750 for plaintiff. In a pretrial affidavit, plaintiff asserted that she had made diligent efforts to obtain business records to support the medical costs she claimed. The sworn statement apparently conflicted with a pretrial deposition where plaintiff admitted she only asked one drug store for the information and neglected to request relevant records from her physicians.

[150] *Id.* at 101, 412 P.2d at 685.

[151] *Id.* (footnote omitted).

[152] State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980). Defendant sought to cross-examine the prosecution witness, who had been granted immunity to testify in the rape and robbery prosecution, regarding the witness' use and possible sale of marijuana.

[153] HAWAII R. EVID. 609(a). Rule 609(c) permits the impeachment use of juvenile convictions "to the same extent as . . . criminal convictions under subsection (a) of this rule." In State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980), the court held that a deferred acceptance of guilty plea is not a conviction and therefore may not be used to impeach a witness even if the crime involved is relevant to the issue of the witness' veracity.

[154] 52 Hawaii 284, 474 P.2d 288 (1970).

[the] witness' credibility."[155] The *Asato* holding is unexciting, but the dicta are powerful:

> [W]e think it unwise to admit evidence of any and all convictions on the issue of credibility. We hold that admission of such evidence should be limited to those convictions that are relevant to the issue of truth and veracity. A perjury conviction, for example, would carry considerable probative value in a determination of whether a witness is likely to falsify under oath. We also think that other crimes that fall into the class of crimes involving dishonesty or false statement would have some value in a rational determination of credibility.[156]

On the other hand, the court said that offenses "like murder or assault and battery"[157] should not be admitted:

> It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will [not] tell the truth. In addition, there is the danger that a moralistic jury might decide not to believe a witness who has been convicted of a serious crime, even though the crime has no rational connection to credibility.[158]

Use of the word "dishonesty" in the rule 609 formulation is intended to invoke the *Asato* wisdom. Does the word embrace theft crimes, which seem to fall in the middle of the spectrum from murder to perjury? Possibly so,[159] but a bright-line answer to this type of question is totally at war with the essentially discretionary nature of the rule 609 decision, which should take into account all aspects of the particular trial setting in which the impeachment is proposed. Another factor of obvious significance is the age of the prior conviction.[160] The idea of discretion is not simply

---

[155] *Id.* at 295, 474 P.2d at 296. The conviction, based on a jury verdict, involved the same traffic accident giving rise to the civil suit for damages in *Asato*. While the prior conviction could not be used to *impeach* the defendant, the court held that it was admissible evidence on the issue of defendant's negligence, although not *conclusive* proof thereof. *Id.* at 290-92, 474 P.2d at 293-94. *See also* Michel v. Valdastri, Ltd., 59 Hawaii 53, 574 P.2d 1299 (1978) (error to disallow evidence that defendant violated Occupational Safety and Health Law to prove negligence); note 63 *supra*.

[156] 52 Hawaii at 293, 474 P.2d at 295.

[157] *Id.*

[158] *Id.*

[159] *See* S. STAND. COMM. REP. No. 22-80, 10th Hawaii Leg., 2d Sess. 10 (1980): "For example, a conviction for assault would not be available for impeachment but a conviction for larceny could be used to impeach." Under a similar formulation contained in federal rule 609(a)(2), *compare* United States v. Donoho, 575 F.2d 718, 721 (9th Cir.), *vacated and remanded pursuant to Memorandum of Solicitor General*, 439 U.S. 811 (1978) (permissible impeachment with petty theft by false representation where appellant had taken gun from his employer), *with* United States v. Ortega, 561 F.2d 803, 805-06 (9th Cir. 1977) (impermissible impeachment with misdemeanor shoplifting conviction for taking two bottles of vodka).

[160] The federal rule imposes an arbitrary, ten-year time limit on prior convictions used to impeach, although the court may exercise discretion to admit the evidence so long as the

to modify the usual standard of appellate review but rather to invest in trial judges an appropriate latitude for multi-factor, contextual decisionmaking.

Rule 609 restates the Hawaii Supreme Court's due process holding in *State v. Santiago*,[161] prohibiting impeachment of the accused by prior conviction.[162] To what extent, it might be asked, does *Santiago* limit cross-examination of the accused with respect to other collateral events under rule 608(b)? The answer is supplied by *State v. Pokini*,[163] where the court approved questioning of the defendant concerning his employment and income sources. The accused, concluded the *Pokini* court, "may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness."[164] The matter is discretionary with the trial court, "[b]ut there are obvious limitations beyond which the court may not allow the examiner to venture."[165]

One such limitation will bar questions about prior criminal conduct of the accused for which no conviction was had.[166] In the first place, such evidence has even less relevance to veracity than have prior convictions, which carry their own assurance that the subject events really occurred.[167] Moreover, if *Santiago* flatly bars use of convictions, then, with even stronger force, it would bar other evidence of the same kinds of conduct

---

adverse party has written notice of the proponent's intent. FED. R. EVID. 609(b). The Hawaii drafters wisely rejected any time limits, recognizing that the age factor may have varying significance depending on the kind of criminal activity presented, as well as other factors in the case.

[161] 53 Hawaii 254, 260, 492 P.2d 657, 661 (1971). The prosecutor had elicited testimony from defendant regarding a prior conviction for burglary in the first degree. This was one of four points raised on appeal and resolved in favor of defendant. The court reversed defendant's conviction for murder of a police officer who was investigating a call of domestic trouble when a gun struggle ensued which resulted in the officer's shooting death.

[162] Rule 609's impeachment bar does not apply where the accused "has himself introduced testimony for the purpose of establishing his credibility as a witness." The *Santiago* court reserved this question: "While we would hesitate to erect a trap under which an unwary defense lawyer's introduction of some trivial evidence concerning the accused's credibility may unleash a flood of damaging prior convictions, we need not reach those matters in this case." 53 Hawaii at 261, 492 P.2d at 661.

[163] 57 Hawaii 17, 548 P.2d 1397 (1976). The court reversed defendant's conviction for conspiracy to murder because of prejudicial conduct of the court and because a transcript containing highly prejudicial details of defendant's involvement in other murders had been admitted into evidence, thereby depriving him of his constitutional right to a fair trial.

[164] *Id.* at 22, 548 P.2d at 1400. *Cf.* United States v. Havens, 100 S. Ct. 1912 (1980) (illegally seized evidence (t-shirt) admissible to impeach defendant's trial testimony in response to cross-examination even though it did not contradict direct examination testimony); State v. Gomes, 59 Hawaii 572, 584 P.2d 127 (1978) (impeachment use of illegally seized pistol permissible where defendant testified on direct examination that police found no weapons).

[165] 57 Hawaii at 22, 548 P.2d at 1400.

[166] *See* note 152 *supra* and accompanying text.

[167] Indeed, the court will not even allow impeachment use of deferred acceptance of guilty pleas, *see* note 153 *supra*, which provoke little doubt that the accused committed the crime involved.

offered for the same purpose of character attack concerning credibility. This result is commended in the commentary to rule 608.

Rule 609.1, which has no federal rule counterpart, governs impeachment by evidence of bias, interest, or motive. The principal purpose of this rule is to restate the result in *State v. Murphy*,[168] where the Hawaii Supreme Court decided that, as a precondition to allowing extrinsic evidence of a witness' bias, interest, or motive, the impeaching material must be brought to the attention of the witness on cross-examination. The *Murphy* court explained:

> First, the foundational cross-examination gives the witness a fair opportunity to explain statements or equivocal facts which, standing alone, tend to show bias. Second, such cross-examination lends expediency to trials, for if the facts showing bias are admitted by the witness, the introduction of extrinsic evidence becomes unnecessary.[169]

Impeachment and support of witnesses' credibility through evidentiary use of their prior statements are the subjects of rule 613. On the impeachment side, several modifications of present practice are effected concerning the foundation that must be established during examination-in-chief of a witness as a condition to extrinsic proof of her prior inconsistent statements. To begin with, rule 613(b) provides that the foundation is required on "direct or cross-examination," in order to achieve consistency with the own-witness impeachment allowance of rule 607.[170] Regarding the nature of the foundation, "(1) the circumstances of the [prior inconsistent] statement [must be] brought to the attention of the witness, and (2) the witness [must be] asked whether [s]he made the statement."[171] A previous statute barred extrinsic evidence where the witness "distinctly" admitted having made the inconsistent statement,[172] but the reason for

---

[168] 59 Hawaii 1, 575 P.2d 448 (1978). Appellant was convicted of murdering a young woman whose body was found in the laundry room of the Waikiki Gateway Hotel. The hotel's assistant manager testified that he saw appellant enter the same elevator as the deceased, which was the last time the victim was seen alive. Defendant sought to show that the witness was biased in favor of the prosecution by proving that he had refused to talk about the case with an investigator from the public defender's office. Because the defense attorney did not cross-examine the assistant manager about the incident with the investigator and because there were no exceptional circumstances which would have made foundational questioning unduly burdensome, the court held that it was not error for the trial court to preclude the defense from calling the investigator to testify on the matter.

[169] *Id.* at 18, 575 P.2d at 459-60.

[170] See text accompanying notes 136-39 *supra*.

[171] HAWAII R. EVID. 613(b). See note 225 *infra*. The foundation requirement, noted the court in State v. Pokini, 57 Hawaii 26, 29, 548 P.2d 1402, 1405, *cert. denied*, 429 U.S. 963 (1976), "is for the purpose of rekindling the witness' memory."

[172] HAWAII REV. STAT. § 621-23 (1976) (repealed 1980); *see* State v. Napeahi, 57 Hawaii 365, 368-75, 556 P.2d 569, 572-76 (1976) (defendant met the statutory requirements for producing extrinsic evidence of prior inconsistent statement of prosecution witness but error was harmless because evidence of guilt was overwhelming).

the bar related to a hearsay concept that also has been modified by the new rules.

Heretofore, all prior inconsistent witness statements were hearsay, usable only for impeachment purposes with an instruction so limiting jury consideration of them. Thus, when the witness admitted making the statement she was effectively impeached; no further purpose justified receiving extrinsic evidence of the statement. Indeed, admitting extrinsic evidence would have risked jury use of the statement for substantive purposes in violation of the limiting instruction. Rule 802.1(1), however, now excepts from the hearsay ban most written or recorded prior inconsistent statements that are offered to impeach under rule 613 and allows their use to prove the truth of their contents.[173] Therefore, impeaching parties should not be precluded from proving these statements even when witnesses admit having made them. They are substantively admissible, if relevant, and should be received, subject to the court's general discretionary control under rule 403.[174] Rule 613(b) thus requires only that the witness be confronted with the circumstances and the contents of the prior statement.[175]

Rule 613(c) provides for limited admissibility of prior consistent witness statements to support credibility, and hearsay rule 802.1(2) effects a corresponding hearsay exception.[176] Consistent statements are usable for support only in three circumstances: (1) where they antedate inconsistent statements that have been elicited under subsection (b); (2) where they rebut an assertion that the witness' testimony was recently fabricated or influenced by bias; and (3) where they rebut an imputation to the witness of inaccurate memory. The first ground was taken from the California Evidence Code;[177] the second, from the federal rules;[178] and the third, from a recent Hawaii Supreme Court decision.[179]

Rule 611(a) admonishes the trial court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evi-

---

[173] See the discussion of rule 802.1(1) in text accompanying notes 210-15 *infra*.

[174] Courts have always exercised discretion to exclude extrinsic evidence of prior inconsistent statements that relate only to collateral matters, *see* McCORMICK, *supra* note 47, at § 47, and this discretion is preserved in rule 613(b). In addition, since prior inconsistent statements not reduced to writing are not excepted from the hearsay exclusion by rule 802.1(1), courts very well may decide to bar extrinsic evidence in this category when the witness admits having made the statement and is thus effectively impeached.

[175] The final legislative report, CONF. COMM. REP. No. 80-80, 10th Hawaii Leg., 2d Sess. 9 (1980) (discussing rule 613(b)), notes that, although the cross-examiner is not bound to afford the witness an opportunity to explain the impeaching statement, "the opposing counsel [who would ordinarily be the proponent of the witness] may very well ask the witness to explain." Deference to trial strategy explains the elimination of the requirement to allow the impeached witness to explain or deny the statement. *Id.*

[176] *See* text accompanying note 216 *infra*.

[177] CAL. EVID. CODE § 791(a) (West 1966).

[178] FED. R. EVID. 801(d)(1)(B).

[179] State v. Altergott, 57 Hawaii 492, 504-05, 559 P.2d 728, 736-37 (1977).

dence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."[180] Rule 611(b) limits the scope of cross-examination to "the subject matter of the direct examination and matters affecting the credibility of the witness,"[181] and rule 611(c) interdicts the use of leading questions on "the direct examination of a witness except as may be necessary to develop his testimony."[182] Rule 612 governs the refreshing of witnesses' memories.[183] These rules faithfully track their federal rule counterparts and work no change in existing law.[184]

VII. Opinions and Expert Testimony

Article VII contains seven rules designed to rationalize and liberalize the practice of receiving opinion evidence. Rule 701 concerns lay witness opinions and admits them when "(1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."[185] The remainder treat the subject of expert witness testimony.

The previous practice concerning expert opinion evidence is aptly illustrated by the Hawaii Supreme Court's opinion in *Cozine v. Hawaiian Catamaran, Ltd.*,[186] a negligence action where the plaintiff had been injured when the mast of a catamaran, owned and operated by the defendant, broke and fell on her. At the trial expert testimony was addressed to the cause of the mast failure and the nature and extent of the plaintiff's injuries. The trial court precluded one expert, a marine engineer and naval architect, from giving his opinion that mast failures of the sort then being litigated commonly occurred in the absence of negligence and that the mast probably failed because of latent defects.

---

[180] In like vein, rule 614 enables the court to call and to interrogate witnesses itself. *Cf.* State v. Schutter, 60 Hawaii 221, 588 P.2d 428 (1978) (trial court's extensive cross-examination of defense witnesses was improper).

[181] Rule 611(b) also enables the court, "in the exercise of discretion, [to] permit inquiry into additional matters as if on direct examination."

[182] Rule 611(c) also permits leading questions "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." See text accompanying notes 136-39 *supra*.

[183] *See* State v. Altergott, 57 Hawaii 492, 502-04, 559 P.2d 728, 735-36 (1977).

[184] For example, rule 615 states the familiar witness exclusion rule, designed to prevent fabrication of testimony, *see, e.g.*, Harkins v. Ikeda, 57 Hawaii 378, 382-84, 557 P.2d 788, 792 (1976).

[185] Previous law was roughly to the same effect, *compare* State v. Sartain, No. 7104 (Hawaii Sup. Ct. Oct. 24, 1980) (no error for trial court to exclude defendant's opinion that amount of heroin normally contained in a $100 paper would be twice the amount defendant was charged with selling), *with* Tsuruoka v. Lukens, 32 Hawaii 263, 264-65 (1932) (father's opinion of child's physical condition following accident admissible).

[186] 49 Hawaii 77, 412 P.2d 669 (1966).

The appellate court sustained exclusion of the opinion on the grounds that it was not necessary, that it invaded the province of the jury, and that in any event it was addressed to an ultimate question.

> It is a sound principle that expert opinions should not be extended beyond the point of necessity, and that encroachment upon the province of the jury should be avoided if possible. . . . [T]he test of the admissibility of expert evidence is whether the jurors are incompetent to draw their own conclusions from the facts without the aid of such evidence. . . . It was for the jury to determine whether the accident was one which ordinarily does not occur in the absence of negligence. The balance of probability rested with the jury, and there was no necessity of eliciting an expert opinion on this ultimate question.[187]

This grudging approach to the forensic use of experts typifies the attitude of the common-law courts.

The medical expert in *Cozine* had examined the plaintiff before trial in order to testify about her physical condition. He was asked a "very long" hypothetical question[188] based upon the evidence theretofore presented, and he gave his opinion. On cross-examination, however, the physician admitted that he based his opinion not only on the material in the hypothetical question but also on things the plaintiff previously told him.[189] In addition, it appeared that he based his opinion to some extent on reports he had received from other physicians, but the other physicians had not been called to testify. For these reasons the court held that the failure of the trial court to grant the motion to strike the testimony of the witness consituted reversible error.[190] Why error?

> A nontreating medical expert cannot base his opinion on the plaintiff's out-of-court statements as to her past condition, not shown to be the same as the evidence of record. Nor can a medical expert opinion be based on the reports of other doctors, which are not of record and contain matters of opinion. The testimony in question was in violation of these rules.[191]

Simply stated, the court's point was that the basis for the opinion was partly hearsay, and, in any event, was not fully presented in the hypo-

---

[187] *Id.* at 92-93, 412 P.2d at 681.

[188] *Id.* at 105, 412 P.2d at 687. The question occupied nearly five pages of trial transcript.

[189] *Id.* at 105-06, 412 P.2d at 687.

[190] *Id.* at 110, 412 P.2d at 690. In Barretto v. Akau, 51 Hawaii 383, 391, 463 P.2d 917, 922 (1969), the court reversed and remanded the case where the trial court had refused to allow *cross-examination* use of a hypothetical question based on facts not yet in evidence. The court noted that the expert's response should be stricken if the facts relied upon were not later proved by the party posing the hypothetical question.

[191] 49 Hawaii at 106, 412 P.2d at 687 (footnote omitted). *Cf.* State v. Davis, 53 Hawaii 582, 589-90, 499 P.2d 663, 669 (1972) (expert property appraiser improperly testified about severance damages based on anonymous engineer's hearsay opinion about a matter that appraiser was not qualified to evaluate as an expert).

thetical question.

The principal purpose of the requirement of a hypothetical question was to ensure that the expert's opinion, to the extent not based upon personal knowledge, would be based entirely upon evidence of record.[192] In short, the rules of evidence were rigorously applied to the basis of expert testimony, even though the experts might have their own rules about the reliability of various kinds of data upon which to base scientific judgments. This approach steadfastly ignored the ability of cross-examiners to sift, and jurors to evaluate, opinions based on hearsay; experts either appreciated the hearsay rule in their practice or would not be heard in court.

Article VII modifies almost every aspect of *Cozine*. Rule 702 addresses the question what is a proper subject matter for expert testimony and scuttles the former "necessity" approach. Expert testimony can be received "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[193] The commentary points out that although rule 702 sets "a broad standard with respect to the scope of expert testimony," the shift is "in degree only" because of the requirement of assistance to the trier of fact.

Rule 703 jettisons the former "basis" limitation: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data [underlying the opinion] need not be admissible in evidence." Federal rule 703, which is to the same effect, "is designed to broaden the basis for expert opinions . . . and to bring the judicial practice into line with the practice of the experts themselves when not in court."[194] Under either rule the testimony of the medical expert in *Cozine* would be received, because physicians commonly rely upon information provided by the patient and reports from other professionals.[195] The manner in which the basis is to be presented

---

[192] McCormick, *supra* note 47, at § 15.

[193] Hawaii R. Evid. 702. The qualifications of experts are discretionary with the court, but rule 702 suggests that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify . . . in the form of an opinion or otherwise." *See, e.g.*, State v. Lloyd, 61 Hawaii 505, 606 P.2d 913 (1980) (police officers may qualify as experts by reason of experience or specialized training).

[194] 28 U.S.C. app., at 571 note (1976).

[195] Hawaii rule 703 contains two safeguards against receipt of utterly untrustworthy opinions. Recognizing the general permissiveness of rules 702 and 703, the Hawaii drafters added the following sentence to rule 703, not contained in the federal counterpart: "The court may, however, disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." Hawaii R. Evid. 703. This seems a desirable counterbalance. Moreover, to the same effect is the rule 703 requirement of reasonable reliance by other experts in the same field: "[A] court would not be justified in 'admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied.' " *Id.* commentary (quoting 28 U.S.C. app., at 571 note (1976)). *Accord*, State v. Antone, 62 Hawaii _, 615 P.2d 101 (1980); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962) (results of

to the trier of fact is the subject of rule 705.

Consistent with rule 703, rule 705 torpedoes the requirement of a hypothetical question:

> The expert may testify in terms of opinion or inference and give his reasons therefor without disclosing the underlying facts or data if the underlying facts or data have been disclosed in discovery proceedings. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

This rule implicitly entrusts evaluation of expert opinions to adversary treatment, which seems preferable to the former practice for several reasons. To begin with, cumbersome hypothetical questions hardly afforded a meaningful foundation for jury judgment.[196] In most instances the questions were lengthy, technical, and confusing. In any event, the new rule does not foreclose the use of hypotheticals on direct or cross-examination. So long as discovery has been available,[197] however, there is simply no need to require disclosure of the basis on direct. Most proponents, of course, can be expected to elicit the basis, either directly or hypothetically, in order to enhance the force and persuasiveness of the opinion.[198] If the underlying data are not otherwise admissible in evidence, limiting instructions under rule 105 will be in order.[199] If the basis is not fully specified on direct examination, the cross-examiner is free to explore all relevant factors. Rule 702.1 makes clear that an expert witness may be fully cross-examined as to "(1) his qualifications, (2) the subject to which his expert testimony relates, and (3) the matter upon which his opinion is based and the reasons for his opinion."[200]

---

polygraph or lie detector test are inadmissible whether offered by the prosecution or the defense).

[196] The hypothetical question requirement was criticized by the court in Barretto v. Akau, 51 Hawaii 383, 388-89, 463 P.2d 917, 921 (1969), *discussed in* note 190 *supra*.

[197] The federal rule allows the proponent to dispense with disclosure of the basis "unless the court requires otherwise," FED. R. EVID. 705, because, as the commentary suggests, disclosure is available in discovery proceedings, *see* 28 U.S.C. app., at 572 note (1976). The Hawaii drafters recognized that pretrial discovery of the basis may not always be available. Experts may be engaged on the eve of trial, or may not be available for deposition. Experts may not submit written reports in advance of trial. Accordingly, Hawaii rule 705 dispenses with the testimonial disclosure requirement "if the underlying facts or data have been disclosed in discovery proceedings." This affords the opponent the same advantage in preparing cross-examination presently enjoyed.

[198] *See, e.g.*, Chung v. Kaonohi Center Co., No. 6190, slip op. at 17-19 (Hawaii Sup. Ct. Oct. 8, 1980). *Cf.* State v. Dillingham Corp., 60 Hawaii 393, 591 P.2d 1049 (1979) (foundation requirements to show similarity of property sales are relaxed where evidence is used to support appraiser's opinion in condemnation action rather than as evidence of comparable sales offered to prove the fair market value of the condemned property).

[199] See the discussion of rule 105 in Part I *supra*.

[200] Rule 702.1, which has no federal rule counterpart, also permits impeachment of an expert by use of scientific texts and treatises whenever a treatise was relied upon by the

Rule 704 establishes that opinion testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The reason usually given for excluding "ultimate" opinions was that they invaded or usurped the jury's function, and this was part of the rationale in *Cozine*.[201] In one limited sense, however, the ultimate issue bar had merit. Witnesses should not be permitted to opine about a defendant's negligence, not because the concept is ultimate but rather because it embraces a legal standard. The question of negligence is for the jury under proper instructions that supply the legal meaning of the term. Accordingly, use of the term by a witness should be prohibited because it risks jury confusion of the witness' subjective notion of the concept with the legal meaning supplied by the court.[202] The question in *Cozine* whether mast failures occur without negligence is therefore objectionable, not because ultimate, but because the answer will not "assist the trier of fact" under rule 702. Moreover, the witness is not qualified to interpret a legal construct. It is believed that courts have in many cases reached proper results by applying the "ultimate issue" test,[203] but the problem always lay in deciding what "ultimate" meant, guided only by the meaningless "invasion" or "usurpation" slogan.[204] The key to rule 704 is that ultimate testimony is no longer objectionable so long as "otherwise admissible." The commentary to the rule quotes from the federal rule commentary:

> Thus the question, "Did T have the [*sic*] capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.[205]

The *Cozine* question should have been formulated to inquire whether mast failures can occur even when catamaran operators exercise the de-

---

expert or when it "qualifies for admission into evidence under rule 803(b)(18)." HAWAII R. EVID. 702.1(b)(2). See the discussion of substantive admissibility of treatise material in text accompanying notes 238-42 *infra*.

[201] *See* text accompanying note 187 *supra*.

[202] *See generally* Korn, *Law, Fact, and Science in the Courts*, 66 COLUM. L. REV. 1080 (1966).

[203] Exclusion of that part of the *Cozine* opinion employing the term "negligence" is an example; however, the expert's opinion that the mast failure was due to latent defects would seem to be admissible under article VII.

[204] In Bright v. Quinn, 20 Hawaii 504, 507 (1911), a witness was asked, "What would you consider to be a safe distance to run from the bough of that tree?" and, "What is the proper distance or space to allow your machine in passing under a tree . . . ?" Disallowance of the questions was sustained because they "in effect called for the opinion of the witness upon the ultimate issue of negligence," *id.* This is exactly the kind of result that is overruled by rule 704, because this is precisely the kind of information the trier of fact needs to decide the negligence question.

[205] HAWAII R. EVID. 704 commentary (quoting 28 U.S.C. app., at 571 note (1976)).

gree of care customarily required in their calling.

VIII. HEARSAY AND THE EXCEPTIONS

Article VIII reorganizes but does not significantly vary the federal hearsay provisions. Rule 801 supplies definitions, and rule 802 states the general exclusion: "Hearsay is not admissible except as provided by these rules, or any other rules prescribed by the Hawaii supreme court, or by statute."[206] Rules 802.1, 803, and 804 provide no fewer than thirty-eight exceptions to the rule! What kind of rule, the reader may be tempted to ask, is it that requires thirty-eight exceptions? Why did not the Hawaii rules innovate and bring simplicity to this opaque area of the law? Part of the answer is that the federal rules presented a formidable obstacle to hearsay law reform. Moreover, lawyers, it seems, always have been charmed by the mysteries and intricacies of hearsay doctrine. It is therefore perhaps appropriate to retain this vestige of mystique and legerdemain.[207]

The stuff of hearsay is out-of-court statements, which include "oral or written assertion[s], or . . . nonverbal conduct of a person, it is is intended by him as an assertion."[208] "Hearsay," according to rule 801(3), "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[209] This circumlocution is necessary to make clear that prior statements of even the witnesses are encompassed in the exclusion. Since the principal policy of the rule, however, is to interdict receipt of untrustworthy utterances that are not subject to cross-examination, and since witnesses are typically available for cross-examination, rule 802.1 excepts a number of prior statements made by witnesses from the ban.

Rule 802.1 is closely related to rule 613, which governs the use of prior witness statements for the limited purposes of impeachment and support.[210] The issue in article VIII is whether the statements can be used substantively, that is, to prove the truth of the matters asserted in them. It will be recalled that rule 613(b) permits a witness to be confronted and

---

[206] *See* State v. Bannister, 60 Hawaii 658, 594 P.2d 1078 (1979) (reversing theft conviction where only evidence of amount and value of stolen apparel was based on store manager's hearsay testimony that invoice, which was not in evidence and was not prepared by manager, indicated 53 shorts were missing).

[207] *But cf.* Note, *The Theoretical Foundation of Hearsay Rules*, 93 HARV. L. REV. 1786 (1980) (advocating abolition of hearsay ban).

[208] HAWAII R. EVID. 801(1). The issue of nonverbal conduct is treated in the commentary to this rule. See text accompanying note 217 *infra*.

[209] *See* State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390 (1980) (not error to admit police officer's testimony that defendant's aunt told him she lied because testimony was offered to explain officer's delay in arresting defendant, not for the truth of the statement). The "declarant," according to rule 801(2), is the "person who makes a statement."

[210] See text accompanying notes 174-79 *supra*.

impeached with any prior inconsistent statement made by her, subject to proper foundational questioning.[211] Rule 802.1(1) selects three classes of such statements "offered in compliance with rule 613(b)" and exempts them from the hearsay ban so long as the witness-declarant "is subject to cross-examination concerning the subject matter of . . . [her] statement."

The first class includes statements made while under oath "at a trial, hearing, or other proceeding, or in a deposition;"[212] the second includes written statements "signed or otherwise adopted or approved by the declarant;"[213] and the third includes "substantially verbatim" and contemporaneous recordings of oral statements made by the declarant.[214] The elements common to these three classes are that the statements are written or recorded, that the writings or recordings were reasonably contemporaneous with the actual utterances, and that the writings or recordings closely embody the precise language of the utterances.[215] Ruled out by these formulations are oral statements not recorded contemporaneously or in substantially verbatim form. Such statements, although usable for impeachment under rule 613(b), will require limiting instructions.

Rule 802.1(2) exempts all prior consistent statements by witnesses "offered in compliance with rule 613(c)" from the hearsay exclusion. Rule 613(c) restricts the circumstances in which prior consistent statements can be offered,[216] and rule 802.1(2) simply obviates the need for limiting instructions in those instances. Rule 802.1(3) admits a witness' prior identification "of a person made after perceiving him." Prior identifications, even when nonverbal, would constitute "statements" for hearsay purposes because the conduct is essentially assertive in nature.[217] Rule 802.1(4) ad-

---

[211] See text accompanying notes 171-75 *supra*.

[212] HAWAII R. EVID. 802.1(1)(A).

[213] *Id.* 802.1(1)(B).

[214] *Id.* 802.1(1)(C).

[215] Federal rule 801(d)(1)(A) admits substantively only those prior statements given under oath, and Hawaii rule 802.1(1)(A) is taken almost verbatim from the federal rule. The United States Supreme Court had proposed that *all* prior inconsistent statements used to impeach be allowed substantively. Fed. R. Evid. 801, 56 F.R.D. 293 (1972). Part of the reason for the congressional limitation was that in the case of sworn statements, as compared with prior oral statements, "there can be no dispute as to whether the prior statement was made." H.R. REP. No. 93-650, 93rd Cong., 1st Sess. (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7075, 7087. The Hawaii drafters felt that this rationale applies equally to the prior written or recorded statements defined in paragraphs (1)(B) and (1)(C) of the Hawaii rule. These definitions, as the commentary to rule 802.1 points out, were taken from the so-called Jencks Act, 18 U.S.C. § 3500(e)(1)-(2) (1976); *see* Palermo v. United States, 360 U.S. 343, 349-52 (1959); Williams v. United States, 338 F.2d 286 (D.C. Cir. 1964). Moreover, the (1)(B) and (1)(C) formulations resemble the definitions of "statement" contained in rules relating to discovery of trial preparation materials, HAWAII R. CIV. P. 26(b)(3)(A)-(B). Admission of this material against accused in criminal cases will not violate constitutional confrontation standards, *see* Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

[216] *See* text accompanying notes 176-79 *supra*.

[217] *See* HAWAII R. EVID. 801(1) commentary.

mits memoranda of "past recollection recorded"[218] if the recordation was substantially contemporaneous with the making of the statement and the witness "now has insufficient recollection to enable him to testify fully and accurately." This is the only 802.1 exception not requiring that the witness be "subject to cross-examination concerning the subject matter of his [prior] statement." The compensating factor in exception (4) is that the statement must be shown "to reflect . . . correctly" knowledge that the witness once had but has since forgotten. Ordinarily the witness himself will testify that, although present recollection is dim, he remembers making the statement and remembers that it was accurate when made. Substantive use of prior witness statements implements the policy of admitting trustworthy material because, having been made earlier in time, the statements present fewer memory and motivation problems than does trial testimony generally.

Rule 803 collects all those exceptions to the hearsay rule for which the "availability of declarant [is] immaterial." In other words, these exceptions do not depend upon any showing concerning the present status or whereabouts of the declarant. The declarant may be unavailable, available and subject to subpoena, or even present in the courtroom. The hearsay is nonetheless received, subject always to relevance and other article IV requirements. Rule 803(a) treats admissions, and rule 803(b) treats other exceptions in the availability-immaterial class. The reason for this breakdown is that the rationales for these two groups of exceptions differ markedly enough to justify, if not compel, differing approaches when courts apply the rules to individual fact situations.

Admissions are nothing more than prior statements of parties or their agents, servants, or predecessors now offered against them.[219] Confusion about this exception is probably attributable to the title word, "admissions." Lawyers and courts sometimes refer to these statements as "admissions against interest," thereby incorrectly suggesting a requirement that they were against interest when made. The Hawaii Supreme Court

---

[218] The formulation is identical with that contained in federal rule 803(5).

[219] *See* Christensen v. State Farm Mut. Auto. Ins. Co., 52 Hawaii 80, 82-84, 470 P.2d 521, 523-24 (1970). In criminal cases, admissions of accused are typically denominated "confessions," but the rationale, specified below in text, is the same. The evidence rules do not attempt to codify restrictions on the use of custodial admissions by accused, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 390-91 (1980) (no error to admit defendant's prior statement to police detective where defendant, who was not then a suspect, voluntarily responded to official request that he go to police station because *Miranda* warnings were not required to be given); State v. Santiago, 53 Hawaii 254, 261-67, 492 P.2d 657, 662-65 (1971) (state constitution precludes use of defendant's statements made before *Miranda* warnings either in prosecution's case-in-chief or for impeachment purposes). *Cf.* State v. Alberti, 61 Hawaii 502, 605 P.2d 937 (1980) (where withdrawal of guilty plea was pending in federal court, admissions made to support plea are admissible in subsequent state prosecution for related offense arising out of the same conduct but would not be admissible after federal court approved withdrawal). *See also* cases cited in note 164 *supra*.

recently addressed this problem and pointed out that "[t]he expression, 'admissions against interest,' is a misnomer."[220] An admission need not have been against declarant's interest when made, recognized the court; the only requirements of this exception are that the statement be relevant and that it now be offered against the party who made it or is considered responsible for its having been made. The rationale is found in the very nature of the adversary system. Regardless of the apparent trustworthiness or lack of trustworthiness of admissions,[221] it seems essentially fair to allow the use against a party of his previous statements relevant to the subject matter of the current litigation. For this reason the commentary to rule 803(a) approves "generous treatment of this avenue to admissibility."[222]

The classic formulation of an admission, "[a] statement that is offered against a party and is (A) his own statement . . . or (B) a statement of which he has manifested his adoption or belief in its truth," is contained in rule 803(a)(1). One class of adoptive admissions is somewhat problematical: When will mere silence be taken as the equivalent of adoption of a statement made by someone else? There cannot be any bright-line rule on this matter because, as the commentary points out, "[t]he decision in each case calls for an evaluation in terms of probable human behavior."[223] The question of adoption is a preliminary determination for the court under rule 104(a),[224] and the decision depends upon whether the nature of the statement, in the light of attending circumstances, was such that the person who remained silent would have been expected naturally to challenge it were it untrue or inaccurate.[225]

Rule 803(a)(2), entitled "Vicarious admissions," is concerned with statements made by agents, servants, or co-conspirators of parties.[226] The statement of an agent or servant not specifically authorized to speak for the party is receivable only if it concerns "a matter within the scope of his agency or employment, [and was] made during the existence of the

---

[220] Kekua v. Kaiser Foundation Hosp., 61 Hawaii 208, 216 n.3, 601 P.2d 364, 370 n.3 (1979).

[221] The *Kekua* court recognized that the requirement of personal knowledge (rule 602), applicable to witnesses and hearsay declarants generally, is relaxed in the case of admissions. *Id.*

[222] HAWAII R. EVID. 803 commentary (quoting 28 U.S.C. app., at 576 note (1976) (Notes of Advisory Committee on Proposed Rules)).

[223] *Id., quoted in* HAWAII R. EVID. 803(a)(1) commentary.

[224] *See* text accompanying notes 24-29 *supra.*

[225] Silence by an accused in custody cannot be deemed the equivalent of adoption of accusations or questions because of the privilege against self-incrimination, *see* Doyle v. Ohio, 426 U.S. 610 (1976). *Cf.* Anderson v. Charles, 100 S. Ct. 2180 (1980) (silence insofar as it omits facts included in defendant's subsequent version is admissible for impeachment purposes as prior inconsistent statement); Jenkins v. Anderson, 100 S. Ct. 2124 (1980) (fifth amendment and due process not violated by impeachment use of prearrest silence).

[226] This rule closely resembles its federal counterpart, FED. R. EVID. 801(d)(2)(C)-(E).

relationship."[227] Paragraphs (a)(3), (4), and (5) treat admissions by decedents in wrongful death actions, by predecessors in interest, and by predecessors in litigation.[228]

The rule 803(b) exceptions are grounded in considerations of inherent trustworthiness. The general hearsay exclusion of rule 802 expresses a preference for live testimony given under oath at trial, which is a principal characteristic of the American justice system. This preference, however, is overlooked in the 803(b) exceptions because their reliability is considered roughly equivalent to that of live testimony. It is for this reason that the current availability of the declarant is not germane to admissibility in any of these exceptions. Different exceptions have distinct rationales or policies that courts should keep in mind when deciding preliminary admissibility questions. In most instances the rationale is specified in the commentary. The most litigated of the rule 803(b) exceptions are excited utterances,[229] statements of physical or mental condition,[230] statements made to physicians,[231] business records,[232] and public records.[233] Each of them has extensive common-law support; hence, discussion here will focus on variations from standard common-law doctrine.

The common law sustained admission of statements to physicians only when made in the context of medical treatment, and the policy was that declarants seeking or receiving treatment would not likely misstate relevant facts. Rule 803(b)(4), however, admits statements made during "medical diagnosis or treatment," thus specifically qualifying statements made to physicians employed only for purposes of the litigation. The old rationale does not justify the expansion, but the commentary points out that these statements will be recited by physicians in any event under rules 703 and 705;[234] thus, the only real impact of the change is to obviate the need for a limiting instruction which would be of dubious efficacy.

The former business records or "shop book" rule is expanded to include records of any "regularly conducted activity," but in other respects does not differ from the previous statute.[235] Because "business" was always defined broadly to include noncommercial occupations and callings, as well as nonprofit institutions, the variation is not a substantial one.

---

[227] HAWAII R. EVID. 803(a)(2). *Accord,* FED. R. EVID. 801(d)(2)(D).

[228] These paragraphs, which have no federal counterparts, resemble California rules, *see* CAL. EVID. CODE §§ 1227, 1225, 1224 (West 1966).

[229] HAWAII R. EVID. 803(b)(2); *see* Anduha v. County of Maui, 30 Hawaii 44, 50-51 (1927). *See generally* State v. Antone, 62 Hawaii _, _ & n.10, 615 P.2d 101, 107-08 & n.10 (1980) (victim's statements made 1½ to 2 hours after rape arguably were excited utterances).

[230] HAWAII R. EVID. 803(b)(3).

[231] *Id.* 803(b)(4).

[232] *Id.* 803(b)(6)-(7).

[233] *Id.* 803(b)(8)-(10).

[234] *Id.* 803(b)(4) commentary. *See* text accompanying notes 194-99 *supra.*

[235] *Compare* HAWAII R. EVID. 803(b)(6), *with* HAWAII REV. STAT. § 622-5 (1976) (repealed 1980). *See* State v. Torres, 60 Hawaii 271, 276-77, 589 P.2d 83, 86-87 (1978); Warshaw v. Rockresorts, Inc., 57 Hawaii 645, 562 P.2d 428 (1977).

The public records exception, identical with its federal counterpart, is expanded to include "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness," or unless the evidence is to be used against a criminal defendant.[236] Dean McCormick argued for receipt of this material: "[T]he conclusions of a professional investigator making inquiries required by his professional and public duty contain assurances of reliability analogous to those relied upon as assuring accuracy of his statements of fact from firsthand knowledge."[237]

Learned treatises and texts are admitted to prove the truth of their contents "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination,"[238] provided the material is established as a reliable authority.[239] Previous practice admitted statements in reliable texts only for impeachment purposes,[240] but the limiting instruction was of questionable validity. Rule 702.1 permits impeachment by treatises that qualify substantively under this rule.[241] Limiting the substantive use of texts to occasions where experts are testifying and thus able to explain them is consistent with the federal rule on the subject.[242]

Rule 804(b) contains six hearsay exceptions[243] that are expressly dependent upon a showing that the declarant is "unavailable as a witness" as that phrase is comprehensively defined in rule 804(a). The theory is that the preference for live testimony should not yield to statements of this class, whose reliability, although substantially greater than that of hear-

---

[236] HAWAII R. EVID. 803(b)(8). The exclusion in criminal cases results from "the almost certain collision with confrontation rights which would result from . . . use [of this material] against the accused in a criminal case," 28 U.S.C. app., at 584 note (1976) (Notes of Advisory Committee on Proposed Rules). The accused's confrontation rights are discussed in text accompanying notes 245-56 *infra*.

[237] MCCORMICK, *supra* note 47, at § 317, at 738. The commentary to this rule suggests that, in evaluating trustworthiness, the court consider "(1) the timeliness of the investigation . . . (2) the special skill or experience of the official . . . (3) whether a hearing was held and the level at which conducted . . . (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109 . . . (1943). Others no doubt could be added." 28 U.S.C. app., at 584 note (1976) (Notes of Advisory Committee on Proposed Rules) (citations omitted), *quoted in* S. REP. NO. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7064-65; HAWAII R. EVID. 803(b)(8)(C) commentary. The rule admits official investigative findings, *see* Hodge v. Seiler, 558 F.2d 284, 288-89 (5th Cir. 1977), but not statements of witnesses even when appended to an official report, John McShain, Inc. v. Cessna Aircraft Co., 563 F.2d 632, 636 (3d Cir. 1977).

[238] HAWAII R. EVID. 803(b)(18).

[239] Reliability, according to rule 803(b)(18), can be established "by the testimony or admission of the witness or by other expert testimony or by judicial notice."

[240] *See* Fraga v. Hoffschlaeger Co., 26 Hawaii 557, 566-67 (1922), *aff'd*, 290 F. 146 (9th Cir. 1923).

[241] See note 200 *supra*.

[242] FED. R. EVID. 803(18). The treatises may not, however, be received as exhibits.

[243] *See* text accompanying notes 261-67 *infra*.

say generally, is thought to be inferior to that of the 803(b) exceptions. Unavailability of a declarant can be found in five circumstances: claim of privilege, refusal to testify despite court order to do so, lack of memory, death or illness, and absence from the trial or hearing where "the proponent of his statement has been unable to procure his attendance by process or other reasonable means."[244] This last ground requires amplification. To begin with, it fails to distinguish between civil and criminal cases, and such a distinction is necessitated by the confrontation clause of the Federal and State Constitutions.

In *State v. Kim*,[245] the Hawaii Supreme Court held that the civil unavailability standard, requiring merely that the declarant of former testimony be shown to be absent from the jurisdiction,[246] would not suffice in criminal cases because of the confrontation clause[247] as it has been construed by the Supreme Court.[248] The purpose of the clause is to preserve the right of accused to be confronted by their accusers and to be able to cross-examine the witnesses against them.

The declarant in *Kim* was out of the State, but the court held that "unavailability" in criminal cases requires additionally that the prosecutor demonstrate "a good faith effort to ascertain the actual location of the witness, and thereafter, if necessary, [make an] . . . attempt to compel the witness's [*sic*] attendance at trial through use of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings."[249] *Kim* involved former testimony,[250] but there is reason to suppose that the strict criminal unavailability requirement will apply equally to the other five exceptions in rule 804(b) because former testimony is more inherently reliable than any of them, and reliability is an

---

[244] HAWAII R. EVID. 804(a)(5). Rule 804(a) also specifies that the declarant "is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying."

[245] 55 Hawaii 346, 519 P.2d 1241 (1974).

[246] *See* Levy v. Kimball, 51 Hawaii 540, 542-43, 465 P.2d 580, 582 (1970) (declarant in New York).

[247] U.S. CONST. amend. VI; HAWAII CONST. art. I, § 14.

[248] 55 Hawaii at 349-50, 519 P.2d at 1244 (discussing Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968)). *Cf.* Ohio v. Roberts, 100 S. Ct. 2531, 2539, 2543-45 (1980) (constitutional requirement of unavailability met where prosecution issued five subpoenas to last known real address of declarant and talked with declarant's mother who testified at trial that she had made unsuccessful efforts to find her daughter).

[249] 55 Hawaii at 350, 519 P.2d at 1244. The Uniform Act referred to by the *Kim* court is HAWAII REV. STAT. ch. 836 (1976), *as amended by* Act 307, 1980 Hawaii Sess. Laws 962.

[250] The court reversed appellant's conviction for negligent homicide where the prosecutor proved defendant had driven her automobile in a grossly negligent manner by relying on pretrial hearing testimony of Dr. Wally to the effect that the injured defendant was drunk at the hospital where she was treated after the accident. Although the State knew the doctor's forwarding address in Missouri, apparently no attempt was made to assure his attendance at trial, even though Missouri had adopted the uniform law.

important factor in confrontation analysis.[251]

Although confrontation clause problems can arise in a variety of hearsay contexts,[252] the Hawaii rules, following the lead of the federal rules, avoid generally codification of civil and criminal differences arguably justified by this constitutional criterion. There are two reasons for this. The Supreme Court has been less than consistent in its confrontation clause decisions, several of which are exceedingly difficult to reconcile.[253] Constitutional requirements are thus difficult to ascertain, and remain in a developmental posture.[254] Moreover, development to date suggests strongly that confrontation issues need to be decided with reference to the entire case against the accused.[255] Secondly, the federal rules were approved, adopted, and transmitted to Congress in 1972 by the very Supreme Court that decides confrontation issues. Justice William O. Douglas dissented to the transmission of the rules because of his reluctance to place the Court's "imprimatur" on them,[256] but he was alone. The rules, as finally approved and promulgated, were in virtually all instances of amendment tightened, not liberalized, by Congress. Therefore, there is good reason to suppose that application of the rules in criminal cases will not offend the Constitution. Moreover, the Hawaii drafters were not insensitive to possible confrontation problems and drafted Hawaii's article VIII with an eye toward the federal rules, the Supreme Court's 1972 proposals, and applicable case law.

In civil cases, on the other hand, proponents will need to show only that rule 804 declarants are out of the State.[257] Suppose the declarant is on one island and the trial is on another. A rule of civil procedure,[258]

---

[251] Ohio v. Roberts, 100 S. Ct. 2531 (1980); Dutton v. Evans, 400 U.S. 74, 88-89 (1970).

[252] Dutton v. Evans, 400 U.S. 74 (1970) (statement against interest); Bruton v. United States, 391 U.S. 123 (1968) (codefendant's admission); Barber v. Page, 390 U.S. 719 (1968) (former testimony); Douglas v. Alabama, 380 U.S. 415 (1965) (prior statement of witness). Admitting substantively prior statements by witnesses that are available for cross-examination does not offend the clause, *see* Nelson v. O'Neil, 402 U.S. 622 (1971); California v. Green, 399 U.S. 149 (1970).

[253] *Compare* Ohio v. Roberts, 100 S. Ct. 2531 (1980) (former testimony), *and* Parker v. Randolph, 442 U.S. 62 (1979) (co-conspirator's admission), *with* Barber v. Page, 390 U.S. 719 (1968) (former testimony), *and* Bruton v. United States, 391 U.S. 123 (1968) (co-conspirator's admission).

[254] *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978).

[255] Dutton v. Evans, 400 U.S. 74, 87 (1970). *Cf.* State v. Napeahi, 57 Hawaii 365, 368-75, 556 P.2d 569, 572-76 (1976) (harmless error to disallow extrinsic evidence of prior inconsistent statement by prosecution witness where evidence of guilt was overwhelming). *See also* State v. El'Ayache, No. 6532 (Hawaii Sup. Ct. Oct. 24, 1980) (approving trial by stipulated testimony of all but one prosecution witness).

[256] 409 U.S. 1132, 1133 (1972) (Douglas, J., dissenting).

[257] Levy v. Kimball, 51 Hawaii 540, 542-43, 465 P.2d 580, 582 (1970); HAWAII R. EVID. 804(a) commentary.

[258] Hawaii R. Civ. P. 32(a)(3)(B) (1972).

superseded by rule 804,[259] previously admitted depositions in this circumstance. Accordingly, the commentary to rule 804(a)(5) elaborates:

> It is intended that the phrase "unable to procure his attendance by process or other reasonable means" . . . be construed in civil cases to allow a finding of unavailability where the declarant of an 804(b) statement resides on another island and the proponent demonstrates that procuring attendance of the declarant would work undue financial hardship, considering the personal circumstances of the proponent and the amount in controversy in the case.

Given the general applicability of the rules in all courts, such a flexible standard seems appropriate in Hawaii.

Assuming a proper showing of declarant's unavailability, a matter addressed to the court under rule 104(a),[260] the rule 804(b) exceptions admit former testimony including depositions,[261] dying declarations,[262] statements against interest,[263] statements of pedigree or family history,[264] and statements of recent perceptions.[265] The former-testimony provision is taken from the rule proposed by the Supreme Court in 1972.[266] It admits testimony or depositions given "at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered."[267] Former testimony and depositions are by definition given under oath and subject to cross-examination, factors that appear to justify admitting the statements so long as the previous party, if someone other than the current party, had a similar motive and interest in offering or confronting the declarant. The rest of the 804(b) exceptions

---

[259] *See generally* Richardson, *supra* note 3, at 31 & n.261, 37-38 & n.326.

[260] See text accompanying notes 24-29 *supra*.

[261] HAWAII R. EVID. 804(b)(1).

[262] *Id.* 804(b)(2). The common law admitted dying declarations only in criminal homicide cases, *see* MCCORMICK, *supra* note 47, at § 283, and federal rule 803(b)(2) admits them in homicide prosecutions and civil cases generally; the Hawaii rule admits them in all cases. Whatever one thinks of the trustworthiness of the final utterances of dying persons, there appears no valid reason for distinguishing among different types of litigation for admissibility purposes. Under the rule a dying declaration must relate to "the cause or circumstances of what . . . [the declarant] believed to be his impending death." HAWAII R. EVID. 804(b)(2).

[263] HAWAII R. EVID. 804(b)(3). State v. Leong, 51 Hawaii 581, 587-88, 465 P.2d 560, 563-64 (1970), anticipated the present rule by approving use of statements against penal interest; *cf.* State v. Bennett, 62 Hawaii _, 610 P.2d 502 (1978) (motive to falsify disqualified statement under the exception). *See also* Chambers v. Mississippi, 410 U.S. 284 (1973) (statements against penal interest offered by an accused).

[264] HAWAII R. EVID. 804(b)(4); *see* Apo v. Dillingham Inv. Corp., 57 Hawaii 64, 66-68, 549 P.2d 740, 742-43 (1976).

[265] HAWAII R. EVID. 804(b)(5). The federal rules contain no "recent perception" exception, but the Supreme Court's 1972 submission contained one, Fed. R. Evid. 804(b)(2), 56 F.R.D. 321 (1972). In addition, rule 804(b)(5) restates the holding in Hew v. Aruda, 51 Hawaii 451, 462 P.2d 476 (1969).

[266] Fed. R. Evid. 804(b)(1), 56 F.R.D. 321 (1972).

[267] HAWAII R. EVID. 804(b)(1).

are unremarkable. Rule 804(b)(6) contains a catch-all provision admitting statements "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" provided they meet a heightened relevance standard and are the subject of pretrial notice. A similar provision is found in rule 803(b)(24).

IX. Miscellaneous Provisions

Articles IX, X, and XI, entitled "Authentication and identification," "Contents of writings, recordings, and photographs," and "Miscellaneous rules," respectively, are treated together here. Article IX, applicable mostly to real evidence, establishes the general requirement of authentication or identification. Rule 901(a) provides that the requirement "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." As applied to tangible objects in general, the identification foundation requires, as Dean McCormick pointed out, "testimony first that the object offered is *the* object which was involved in the incident, and further that the condition of the object is substantially unchanged."[268] As applied to writings in particular, the authentication requirement typically demands extrinsic proof of authorship.

Rule 901(b) provides examples of proper and satisfactory identification evidence. Testimony of a witness, upon personal knowledge, "that a matter is what it is claimed to be"[269] is the first example. Many of the illustrations relate specifically to document authentication: nonexpert opinions on handwriting,[270] expert comparisons with exemplars,[271] public records,[272] and ancient documents.[273] A method for authentication of tele-

---

[268] McCormick, *supra* note 47, at § 212, at 527 (footnote omitted) (original emphasis). Regarding the foundational "chain of custody" requirements, *compare* State v. Sugimoto, 62 Hawaii _, _, 614 P.2d 386, 392 (1980) (check was properly admitted despite incomplete chain-of-custody showing because the object possesses unique characteristics and was identified by three witnesses), *and* State v. Olivera, 57 Hawaii 339, 344-45, 555 P.2d 1199, 1202-03 (1976) (chain-of-custody showing not required for inked fingerprint card where there was direct testimony of its unchanged condition and no evidence indicating tampering), *with* State v. Vance, 61 Hawaii 291, 303-04, 602 P.2d 933, 942 (1979) (where drugs or chemicals are involved, chain-of-custody must be proven only for period before substance was tested but not thereafter). *See also* State v. Antone, 62 Hawaii _, 615 P.2d 109 (1980) (no error in failure to object to admissibility of rape victim's clothes where it is reasonably certain that tampering did not occur).

[269] Hawaii R. Evid. 901(b)(1).

[270] *Id.* 901(b)(2).

[271] *Id.* 901(b)(3).

[272] *Id.* 901(b)(7).

[273] *Id.* 901(b)(8). *Cf.* Hulihee v. Heirs of Hueu, 57 Hawaii 312, 555 P.2d 495 (1976) (not error to exclude deeds where evidence failed to explain custody link and subsequent conduct of proponent repudiated genuineness of documents).

phone conversations is also included.[274] Rule 902, entitled "Self-authentication," sets forth a number of instances in which "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required." Several of these concern public documents and official publications, but the list also includes newspapers,[275] trade inscriptions,[276] and commercial paper.[277] Finally, rule 903 establishes that "[t]he testimony of a subscribing witness is not necessary to authenticate a writing."

Article X codifies and liberalizes the so-called best evidence rule.[278] Rule 1001 provides definitions, and rule 1002 states the essential proposition: "To prove the content of a writing, recording, or photograph, the original . . . is required, except as otherwise provided in these rules or by statute." Rule 1003, however, allows for general admissibility of "duplicates," which are defined so as to include carbon copies, photographic reproduction, and "other equivalent techniques which accurately reproduce the original."[279] Rule 1004 lists exceptions, rule 1005 governs public records, and rule 1006 admits summaries "of voluminous writings, recordings, or photographs which cannot conveniently be examined in court."

Article XI establishes the general applicability of the evidence rules in "all courts of the State of Hawaii except as otherwise provided by statute."[280] The exceptions include preliminary determinations of admissibility under rule 104(a),[281] grand jury proceedings, preliminary hearings in criminal cases, sentencing proceedings, and proceedings before the small claims courts. Rule 1102 is addressed to the matter of jury instructions: "The court shall instruct the jury regarding the law applicable to the facts of the case, but shall not comment upon the evidence. It shall also inform the jury that they are the exclusive judges of all questions of fact and the credibility of witnesses."[282] Rule 1102 has no federal rules counterpart.[283]

---

[274] HAWAII R. EVID. 901(b)(6).

[275] *Id.* 902(6).

[276] *Id.* 902(7).

[277] *Id.* 902(9).

[278] *See generally* MCCORMICK, *supra* note 47, at ch. 23 (1972 & Supp. 1978).

[279] HAWAII R. EVID. 1001(4).

[280] *Id.* 1101.

[281] See text accompanying notes 27-30 *supra*.

[282] Previous Hawaii law, HAWAII REV. STAT. §§ 635-15, -17 (1976) (repealed 1980), authorized judicial comment on the evidence in criminal cases but was silent about civil cases. The rationale for rule 1102 is that judicial comment risks casting the court in the role of an advocate, *cf.* State v. Pokini, 57 Hawaii 17, 23-26, 548 P.2d 1397, 1401-02 (1976) (no justification for trial court's remarks demeaning defense counsel), and that adversary comment on evidence should suffice to elucidate the issues. See text accompanying notes 133-35 *supra*.

[283] The Supreme Court's 1972 submission contained a rule, Fed. R. Evid. 105, 56 F.R.D. 199 (1972), that would have permitted the judge to sum up and comment upon the evidence and the credibility of witnesses. Recognizing that the rule simply restated existing federal law and practice, Congress struck the rule but intended not to change the practice. *See* 1 WEINSTEIN'S EVIDENCE, *supra* note 7, at 107-2 (1979).

X. Conclusion

The Hawaii Rules of Evidence, like any other new codification, can be expected to generate an initial spate of litigation as judges and practitioners gain familiarity with the rules and litigants test the meanings of individual provisions. Such is the price of codification and uniformity. With uniformity comes predictability, and predictability ultimately will tend to decrease the amount of litigation at the trial and appellate levels.

Uniformity, however, does not imply a wooden, uncritical application of rules to fact situations. Many of the rules, especially those pertaining to relevance and its counterweights, demand an informed exercise of judicial discretion. The rules should provide a solid framework for such decisions. The goal is truthseeking, and the rules were framed with this goal in mind.